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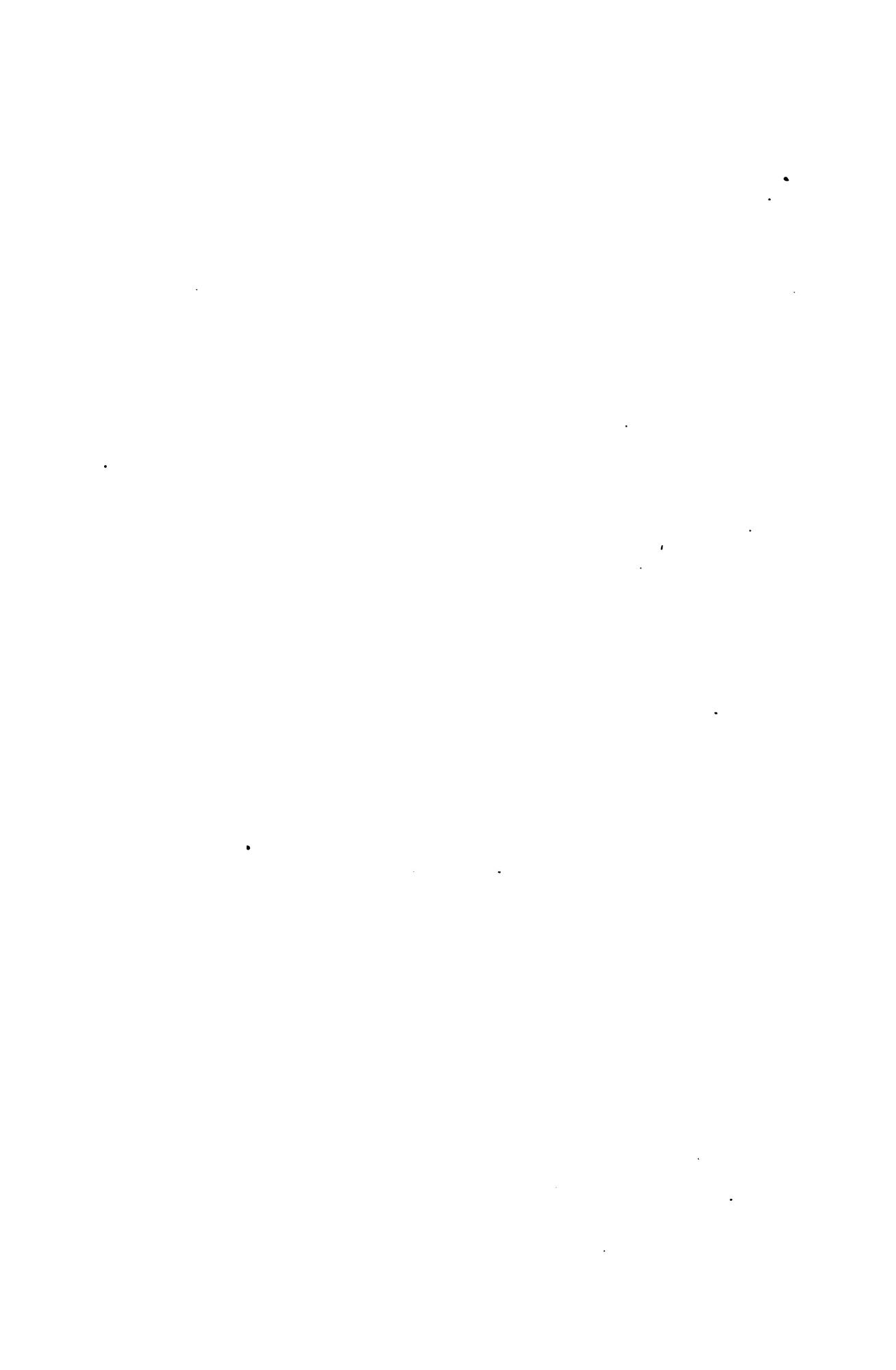
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HALE'S
H I S T O R Y
OF THE
PLEAS OF THE CROWN.

V O L. I.

Extract from the Journal of the House of Commons.

Lunæ 29° die Novemb. 1680.

ORDERED, That the Executors of Sir *Matthew Hale*, late Lord Chief Justice of the Court of King's Bench, be desired to print the MSS. relating to the Crown-law; and that a Committee be appointed to take care in printing thereof, and it is referred to

Sir <i>Will. Jones</i> ,	Mr. <i>Sacheverel</i> ,
Serj. <i>Maynard</i> ,	Mr. <i>GEO. Petham</i> ,
Sir <i>Fra. Winnington</i> ,	Mr. <i>Paul Foley</i> .

Historia Placitorum Coronae.

THE
HISTORY
OF THE
Pleas of the Crown.
By SIR MATTHEW ~~HALE~~,
LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

PUBLISHED FROM THE ORIGINAL MANUSCRIPTS

By SOLLOW EMLYN, of Lincoln's-Inn, Esq.

WITH

ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE PLEAS OF THE CROWN.

By GEORGE WILSON, SERJEANT AT LAW.

A NEW EDITION.

AND

AN ABRIDGMENT OF THE STATUTES RELATING TO FELONIES
CONTINUED TO THE PRESENT TIME, WITH NOTES
AND REFERENCES,

By THOMAS DOGHERTY, Esq.
OF CLIFFORD'S-INN.

In Two Volumes.

VOL. I.



Printed by E. Rider, Little-Britain,

FOR T. PAYNE, H. L. GARDNER, W. OTTRIDGE, E. AND R. BROOKE AND
J. RIDER, J. BUTTERWORTH, W. CLARKE AND SON, R. PHENEY,
J. CUTHELL, J. WALKER, J. BAGSTER, AND R. BICKERSTAFF.

1800.



ADVERTISEMENT.

THE former Edition of this truly valuable Work, by Mr. SERJEANT WILSON, having been long out of print, induced the Publishers to send it again to the press. The additional notes and references to modern cases concerning the PLEAS OF THE CROWN, which were inserted in the margin of the former Edition, are placed at the end of each Chapter in the present; and an Abridgment of those Statutes relating to Felonies, which have been enacted since the first publication of the Work, to the present time, is introduced after the Addenda in Notis, at the end of the first volume, in order to prevent any derangement of the original paging.



TO THE RIGHT HONOURABLE
SIR JOSEPH JEKYLL, KNT.

MASTER OF THE ROLLS,

And One of His Majesty's Most Honourable Privy-Council.

SIR,

As it is to you that the Public are indebted for rescuing this valuable work from the obscurity wherein it hath long lain, the preparing of which for the press you were pleased to commit to my care, I thought it became me to inscribe your name on that, to which you are so justly entitled; nor know I any to whom it could with greater propriety be addressed, than to one who bears so near a resemblance to the Author, in those great and good qualities for which he was so deservedly esteemed.

An unblemished integrity and upright conduct in every character of life, whether as a private person, a senator, or judge; a generous frankness and open sincerity in conversation; an unalterable adherence in all stations to the principles of civil and religious liberty, accompanied with a serious regard to true piety and virtue; a firm attachment to our constitution in times of the greatest difficulty and danger; a disinterested zeal for the welfare of mankind, manifested by

THE DEDICATION.

unwearied labours for the public good, uninfluenced by the spirit of a party, or any sinister motive, are excellencies which no less eminently distinguish you than they did the author of this treatise ; and as they procured him such a lasting veneration and esteem, so while the same causes are productive of the same effects, they will in like manner transmit your memory to after-times with honour and renown.

To enlarge upon this subject, how agreeable soever to others, would, I know, be offensive to you, who are more regardful of the approbation of your own mind, than any outward applauses, and while you are intent upon really being and doing good, are no less studious to avoid all ostentatious shews of it. I shall, therefore, only add, that I am,

SIR,

With great respect,

Your Honour's,

Most obedient,

Humble Servant,

SOLLOM EMLYN.

T H E

P R E F A C E.

THE following treatise being the genuine offspring of that truly learned and worthy judge Sir *Matthew Hale* (a), stands in need of no other recommendation, than what that great and good name will always carry along with it,

Whoever is in the least acquainted with the extensive learning, the solid judgment, the indefatigable labours, and above all the unshaken integrity of the author, cannot but highly esteem whatever comes from so valuable an hand.

Being brought up to the profession of the law, he soon grew eminent in it, discharging his duty therein with great courage and faithfulness; and tho he lived in critical times, when disputes ran so high between king and parliament, as at last broke out into a civil war, yet he engaged in no party, but carried himself with such moderation and evenness of temper, as made him loved and courted by all.

It was this great and universal esteem he was then in, that made *Cromwel* so desirous to have him for one of his judges; which offer he would willingly have declined. Being prest by *Cromwel* to give his reason, he at last plainly told him, that he was not satisfied with the lawfulness of his authority, and therefore scrupled the accepting any commission under it; to which *Cromwel* replied, that since he had got the possession of the government, he was resolved to keep it, and would not be argued out of it; that however it was his desire to rule according to the laws of the land, for which purpose he had pitched upon him as a person proper to be employed in the administration of justice; yet

(a) He was born at *Alderley*, in *Cheshire*, Nov. 1, 1609.

Was entered at *Magdalen-Hall*, in *Oxford*, in the 17th year of his age.

Admitted of *Lincoln's-Inn*, Nov. 8, 1629.

Made a judge of the court of Common Pleas 1653.

Lord Chief Baron of the Court of Exchequer, Nov. 7, 1660.

And at last Lord Chief Justice of the court of King's Bench, May 18, 1671.

Which place he resigned Feb. 20, 1675-6.

And died the Christmas following, Dec. 25, 1676.

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if they would not permit him to govern by red gowns, he was resolved to govern by red coats.

Upon this consideration, as also of the necessity there at all times is, that justice and property should be preserved, he was prevailed with to accept of a judge's place in the court of common-pleas, wherein he behaved with great impartiality, constantly avoiding the being concerned in any state-affairs; and tho for the first two or three circuits he sat indifferently on the plea-side, or the crown-side, yet afterwards he absolutely refused to sit on the crown-side, thinking it the safer course in so dubious a case.

But notwithstanding his dislike to *Cromwell's* government, yet this did not drive him, as it did some others, into the extremes of the contrary party; for upon the restoration, of which he was no inconsiderable promoter, he was not for making a surrender of all, and receiving the king without any restrictions; on the contrary, he thought this an opportunity not to be lost for limiting the prerogative, and cutting off some useless branches, that served only as instruments of oppression; for which purpose he moved, as bishop *Burnet* relates (*b*), "That a committee might be appointed to look into the propositions that had been made, and the concessions that had been offered by the late king, and from thence to digest such propositions, as they should think fit to be sent over to the king."

This motion was seconded, and tho through general *Monk's* means it failed of success, yet it shewed our author's tender regard for the liberties of the subject, and that he was far from being of a mind with those, who looked on every branch of the prerogative as *iure divino* and indefeasible.

But notwithstanding this attempt, which shewed he was not cut out for such compliances, as usually render a man acceptable to a court, yet such was his unblemished character, that it was thought an honour to his majesty's government to advance him first to the station of Lord Chief Baron, and afterwards to that of Lord Chief Justice of the king's bench; nor indeed could so great a trust be lodged in better hands.

When he was first promoted, the Lord Chancellor *Clarendon*, upon delivering to him his commission, told him, among other things, "That if the king could have found out an honest or fitter man for that employment, he had not advanced him to it, and that he had therefore preferred him, because he knew none that deserved so well (*c*)."

(*b*) *Burnet's hist. of own times*, Vol. I. p. 88. (*c*) *Burnet's life of Hale*, Edit. 1682; p. 53.

He behaved in each of these places with such uncorrupt integrity, such impartial justice, such diligence, candor, and affability, as justly drew the chief practice after him, whithersoever he went; he constantly shunned not only the being corrupt, but every thing which had any appearance, or might afford the least suspicion of it; he was sincerely bent on discovering the truth and merits of a cause, and would therefore bear with the meanest counsel, supply the defects of the pleader, and never take it amiss, when summing up the evidence, to be reminded of any circumstance he had omitted; for being in a high degree possessed of that qualification so peculiarly necessary to a judge, I mean patience (without which the most excellent talents may become insignificant), no considerations of his own convenience could prevail with him to hurry over a cause, or dispatch it without a thorough examination; for which reason he made it a rule, especially upon the circuits, to be short and sparing at meals, that he might not either by a full stomach unfit himself for the due discharge of his office, or by a profuse waste of time, be obliged to put off, or precipitate the business that came before him.

He was a great lamentor of the divisions and animosities which raged so fiercely at that time among us, especially about the smaller matters of external ceremonies, which he feared might in the end subvert the fundamentals of all religion: and tho he thought the principles of the non-conformists too narrow and strait-laced, yet he could by no means approve the penal laws which were then made against them; he knew many of them to be sober, peaceable men, who were well affected to the government, and had shewn as much dislike as any to the late usurpation, and therefore he thought they deserved a better treatment; besides, he looked on it as an infringement on the rights of conscience, which ought always to be held sacred and inviolable, and therefore used to say, that the only way to heal our breaches was *a new act of uniformity*; for which purpose he concurred with Lord Keeper Bridgeman and Bishop Wilkins, in setting on foot a scheme for the comprehension of the more moderate dissenters, and an indulgence towards others, and drew the same up into the form of a bill, altho by a vote of the house of commons it was prevented from being laid before the parliament.

Tho by this means he was hindered from obtaining a repeal of those laws, yet could he never be brought to give any countenance to the execution of them. I have heard it credibly related, that once when he was upon the circuit, there happened to be a grand jury, who thought to make a merit of presenting a worthy peaceable non-conformist, that lived in their neighbourhood; upon this occasion our judge

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judge could not avoid reprimanding them for their ill-placed zeal, which vented itself this way, while no notice was taken of the profaneness, drunkenness, and other immoralities, which abounded daily amongst them; in short, he told them, that if they were resolved to persist, he would remove the affair to *Westminster-Hall*, and if he could not then prevail to have a stop put to it, he would resign his place; for he had told the king, when he first accepted it, that if any thing was pressed upon him, which was against his judgment, he would quit his post.

He always retained a serious impression of religion, and in particular was a punctual observer of any vow or engagement he had laid himself under. Having in his younger days on a particular occasion made a vow never to drink an health again, he could never be prevailed on upon any consideration to dispense with it, altho drinking healths was then grown to be the fashionable loyalty of the times.

And thus in every character of life he was a pattern well worthy of imitation: in short, he was a public blessing to the age he lived in, and not to that only, but by his bright and amiable example to succeeding generations; for as a pattern of virtue and goodness will always be a silent, tho sharp reproof to those who deviate from it, so to noble and generous minds it will not fail of being a mighty spur and incentive to the imitation of it, and by that means leave a real and lasting, tho secret, influence, behind it.

As he justly merited the esteem of all, so in particular he has well deserved of the profession of the law, to which he was so shining an ornament; he contributed more by his example to the removal of the vulgar prejudices against them, than any argument whatever could do:

The great Archbishop *Usher* had entertained some prejudices of that kind, but by conversation with our author and the learned *Selden*, he was convinced of his mistake; our author declaring, "That by his acquaintance with them, he believed there were as many honest men among the lawyers proportionably, as among any profession of men in *England*."

Never was the old monkish maxim, *Bonus Jurista malus Christa*, more thoroughly confuted, than by his example. He demonstrated by a living argument, how practicable it was to be both an able lawyer and a good christian; indeed he saw nothing in the one that was any way incompatible with the other, nor did he think, that an unaffected piety sat with an ill grace on any, be his station never so high, or his learning never so great; for tho he diligently applied himself to the business of his profession, yet woud he never suffer it so to engross his time as to leave no room for matters of a more serious concernment, as

may

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may appear from the many tracts he has wrote on moral and religious subjects.

For this reason, when he found the decays of nature gaining ground upon him, he could no longer be prevailed with to suspend the resolution he had taken to resign his place; that after the example of that great emperor *Charles V.* he might have an interstice between the busines of life and the hour of death (*d*).

No wonder then that one so great, so good, should be loved and esteemed while living, should be revered and admired when dead; no wonder the king should be loth to part with him, who had been such a credit to his government; tho had he held his place some few years longer, such a scene of affairs did then open, as in all likelihood would have greatly distressed him how to behave, as well as the court how to get rid of one, who could not have been removed without great reproach, nor continued without great obstruction to the violent measures that were then pursued.

But it is time to stop, for I mean not to write the history of his life; this would require a volume of itself, and is long ago performed by an able hand (*e*); I shall therefore only subjoin his character, as drawn by that learned prelate, and other eminent cotemporaries, by which it will appear, that future times cannot outgo his own in the veneration and esteem they bore him.

The Bishop expresses it in short thus: "That he was one of the greatest patterns this age has afforded, whether in his private deportment as a christian, or in his public employments, either at the bar or on the bench (*f*);" having given it more at large (*g*) in the words of a noble person, whom he styles one of the greatest men of the posession of the law (*h*): "he would never be brought to discuss of public matters in private conversation; but in questions of law, when any young lawyer put a case to him, he was very communicative, especially while he was at the bar: but when he came to the bench, he grew more reserved, and would never suffer his opinion in any case to be known, till he was obliged to declare it judicially; and he concealed his opinion in great cases so carefully, that the rest of the judges in the same court could never perceive it: his reason was, because every judge ought to give sentence according to his own persuasion and conscience, and not to be swayed by any respect or deference to another man's opinion: and by this means it happened

(*d*) *Inter vita negotia & mortis dicem sportere spatium intercedere. Strada ac bello Belllico, Vol. I. sub anno 1555.*
(*e*) Bp. Burnet.

(*f*) p. 218.
(*g*) p. 172.
(*h*) Supposed to be the then earl of Nottingham.

" sometimes,

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“ sometimes, that when all the barons of the Exchequer had delivered
“ their opinions, and agreed in their reasons and arguments, yet he
“ coming to speak last, and differing in judgment from them, hath ex-
“ pressed himself with so much weight and solidity, that the barons have
“ immediately retracted their votes, and concurred with him. He
“ hath sat as a judge in all the courts of law, and in two of them as
“ chief; but still wherever he sat, all business of consequence followed
“ him, and no man was content to sit down by the judgment of any
“ court, till the cause was brought before him, to see whether he were
“ of the same mind; and his opinion being once known, men did
“ readily acquiesce in it; and it was very rarely seen, that any man
“ attempted to bring it about again; and he that did so, did it upon
“ great disadvantages, and was always looked upon as a very con-
“ tentious person; so that what *Cicero* says of *Brutus*, did very often
“ happen to him, *Etiam quis contra statuit, aequus placatusque dimisit.*

“ Nor did men reverence his judgment and opinion in courts of law
“ only; but his authority was as great in courts of equity, and the
“ same respect and submission was paid him there too; and this ap-
“ peared not only in his own court of equity in the Exchequer chamber,
“ but in the Chancery too, for thither he was often called to advise and
“ assist the lord chancellor, or lord keeper for the time being; and if
“ the cause were of difficult examination, or intricated and entangled
“ with variety of settlements, no man ever shewed a more clear and
“ discerning judgment: if it were of great value, and great persons
“ interested in it, no man shewed greater courage and integrity in
“ laying aside all respect of persons. When he came to deliver his
“ opinion, he always put his discourse into such a method, that one
“ part of it gave light to the other; and where the proceedings of
“ Chancery might prove inconvenient to the subject, he never spared
“ to observe and reprove them: And from his observations and dis-
“ courses, the Chancery hath taken occasion to establish many of those
“ rules by which it governs itself at this day.

“ He did look upon equity as a part of the common law, and one of
“ the grounds of it; and therefore, as near as he could, he did always
“ reduce it to certain rules and principles, that men might study it as
“ a science, and not think the administration of it had any thing arbi-
“ trary in it. Thus eminent was this man in every station, and into
“ what course soever he was called, he quickly made it appear, that
“ he deserved the chief seat there.

“ As great a lawyer as he was, he would never suffer the strictness
“ of law to prevail against conscience; as great a chancellor as he was,
“ he would make use of all the niceties and subtleties in law, when it
“ tended

“ tended to support right and equity. But nothing was more admirable
“ in him, than his patience: he did not affect the reputation of quick-
“ ness and dispatch, by a hasty and captious hearing of the counsel: he
“ would bear with the meanest, and gave every man his full scope,
“ thinking it much better to lose time than patience: in summing up
“ of an evidence to a jury, he would always require the bar to inter-
“ rupt him if he did mistake, and to put him in mind of it, if he did for-
“ get the least circumstance: some judges have been disturbed at this as
“ a rudeness, which he always looked upon as a service and respect
“ done to him.

“ His whole life was nothing else but a continual course of labour and
“ industry and when he could borrow any time from the public service,
“ it was wholly employed either in philosophical or divine meditations:
“ and even that was a public service too, as it hath proved; for they
“ have occasioned his writing of such treatises as are become the choice
“ entertainment of wise and good men, and the world hath reason to
“ wish that more of them were printed. He that considers the active
“ part of his life, and with what unwearied diligence and application of
“ mind he dispatched all mens busyness which came under his care,
“ will wonder how he could find any time for contemplation: he that
“ considers again the various studies he past thro, and the many col-
“ lections and observations he hath made, may as justly wonder how he
“ could find any time for action: but no man can wonder at the exem-
“ lary piety and innocence of such a life so spent as this was, wherein as
“ he was careful to avoid every idle word, so it was manifest he never
“ spent an idle day. They who came far short of this great man, will
“ be apt enough to think that this is a panegyric, which indeed is a
“ history, and but a little part of that history which was with great truth
“ to be related of him. Men who despair of attaining such perfection,
“ are not willing to believe that any man else did ever arrive at such a
“ height.

“ He was the greatest lawyer of the age, and might have had what
“ practice he pleased; but tho he did most conscientiously affect the
“ labours of his profession, yet at the same time he despised the gain of
“ it; and of those profits which he would allow himself to receive, he
“ always set apart a tenth penny for the poor, which he ever dispensed
“ with that secrecy, that they who were relieved, seldom or never knew
“ their benefactor. He took more pains to avoid the honours and pro-
“ ferments of the gown, than others do to compass them. His modesty
“ was beyond all example; for where some men who never attained to
“ half his knowledge, have been puffed up with a high conceit of them-
“ selves, and have affected all occasions of raising their own esteem by
“ depreciating

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" depreciating other men, he on the contrary was the most obliging man
 " that ever practised. If a young gentleman happened to be retained
 " to argue a point in law, where he was on the contrary side, he would
 " very often mend the objections when he came to repeat them, and
 " always commend the gentleman, if there were room for it; and one
 " good word of his was of more advantage to a young man, than all the
 " favour of the court could be."

Upon the promotion of lord chief justice *Rainsford*, who succeeded him in that office, the then lord chancellor express himself thus: (i) " The vacancy of the seat of the chief justice of this court, and that by a way and means so unusual, as the resignation of him, that lately held it, and this too proceeding from so deplorable a cause as the infirmity of that body, which began to forsake the ablest mind that ever presided here, hath filled the kingdom with lamentations, and given the king many and pensive thoughts how to supply that vacancy again." And then addressing himself to his successor: " The very labours of the place, and that weight and fatigue of business, which attends it, are no small discouragements; for what shoulders may not justly fear that burden, which made him stoop, that went before you? Yet I confess you have a greater discouragement than the mere burden of your place, and that is the unimitable example of your predecessor. *One resum est succedere bono principi* was the saying of him in the panegyric, and you will find it so too, that are to succeed such a chief justice, of so indefatigable an industry, so invincible a patience, so exemplary an integrity, and so magnanimous a contempt of worldly things, without which no man can be truly great; and to all this a man that was so absolute a master of the science of the law, and even of the most abstruse and hidden parts of it, that one may truly say of his knowledge of the law, what St. Austin said of St. Hierom's knowledge in divinity. *Quod Hieronymus nescivit, nullus mortalium unquam scivit.* And therefore the king would not suffer himself to part with so great a man, till he had placed upon him all the marks of bounty and esteem, which his retired and weak condition was capable of."

To this the new chief justice, speaking of his predecessor, answered in the following words.

" — A person in whom his eminent virtues and deep learning have long managed a contest for the superiority, which is not decided to this day, nor will it ever be determined, I suppose, which shall get the upper hand: A person that has sat in this court many years, of whose actions there I have been an eye and ear witness; that by the

" greatness of his learning, always charmed his auditors to reverence and
 " attention : A person of whom I think I may boldly say, that as for-
 " mer times cannot shew any superior to him, so I am confident succeed-
 " ing and future time will never shew any equal. These considerations,
 " heightened by what I have heard from your lordship concerning him,
 " made me anxious and doubtful, and put me to a stand how I should
 " succeed so able, so good, and so great a man. It doth very much
 " trouble me, that I, who, in comparison of him, am but like a candle
 " lighted in the sun-slitne, or like a glow-worm at mid-day, should
 " succeed so great a person, that is and will be so eminently famous to
 " all posterity ; and I must ever wear this motto in my breast to comfort
 " me, and in my actions to excuse me,

" *Sequitur, quamvis non possibus quis.*"

Mr. Baxter, with whom our author was very intimate towards the latter part of his life, describes him in these words (*k*), " Sir Matthew Hale, that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice, who would not have done an unjust act for any worldly price or motive, the ornament of his majesty's government, and honour of *England*, the highest faculty of the soul of *Westminster-Hall*, and pattern to all the reverend and honourable judges; that godly serious practical christian, the lover of goodness and all good men, a lamentor of the clergies selfishness and unfaithfulness and discord, and of the sad divisions following hereupon; an earnest desirer of their reformation, concord, and the church's peace, and of a reformed act of uniformity, as the best and necessary means thereto; that great contemner of the riches, pomp and vanity of the world; that pattern of honest plainness and humility, who while he fled from the honour that pursued him, was yet lord chief justice of the king's-bench, after being long lord chief baron of the Exchequer; living and dying, entring on, using, and voluntarily surrendering his place of judicature with the most universal love, honour and praise, that ever did *English* subject in this age, or any that just history doth acquaint us with, &c. &c. &c.

Thus far for the author.

As to the work itself, if any of our author's performances might challenge the precedence of the rest, this seems to have the justest claim to it, as being a favourite work, which he often reviewed, and was at vast pains and charge in furnishing himself with proper materials for

(k) Baxter's notes on Lord Hale's life, p. 43:

x

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His compassionate concern for the lives and liberties of mankind on the one hand, and for preserving the public peace and tranquility on the other, had possessed him with an opinion of the high importance, that the pleas of the crown, especially those relating to capital offenses, should be reduced to certain rules, and those rules clearly and plainly understood, that so there might be as little room left as possible either for erring in, or perverting of judgment.

It was this led him to make the crown law his principal study, to which he applied himself with great assiduity; for as bishop *Burnet* speaking of this treatise informs us (*l*), “ It was by much search and “ long observation he composed that great work concerning it.” The same author acquaints us (*m*), that he had begun his collections relating hereto in the reign of King *Charles I.* “ But after the king was mur-“ dered he laid them by; and that they might not fall into ill hands, he “ hid them behind the wainscotting of his study, for he said, *there was* “ *no more occasion to use them, till the king should be again restored to his* “ *right;* and so upon his majesty’s restoration he took them out, and “ went on in his design to perfect that great work.”

Hence it appears highly probable, that he intended this work for the public, altho the business of his station did not afford him leisure to publish it during his life; however, about four years after his death, the house of Commons took singular notice of it, and thought it a work of such consequence, as to pass a vote (*n*), desiring his executors to print it; and appointed a committee to take care thereof: but that parliament being soon after dissolved (*o*), this design dropt.

Some years since there was published a treatise, intitled, *Pleas of the Crown by Sir Matthew Hale*; but this was only a plan of this work, containing little more than the heads or divisions thereof, concerning which the editor in his preface expresses himself thus, “ He [our author] “ hath written a large work upon this subject, intitled, *An History of the Pleas of the Crown*, wherein he shews what the law anciently was in “ these matters, what alterations have from time to time been made in “ it, and what it is at this day. He wrote it *on purpose to be printed*, “ finished it, had it all transcribed for the press in his life-time, and had “ revised part of it after it was transcribed.”

It is therefore to be hoped, the publication hereof will not be thought any way to interfere with the direction of his will, *That none of his MSS. should be printed after his death, except such as he should give order for* during his life, his intention for printing it being so apparent, as may well amount to an order for so doing.

(*l*) p. 90.

(*m*) p. 39.

(*n*) Nov. 29, 1680.

(*o*) Jan. 18, 1680.

Besides,

Besides, as bishop *Burnet* observes (*p.*), this prohibitory clause in the will seems in some measure to be revoked by his codicil, wherein he orders, *that if any book of his writing should be printed, then what should be given as a consideration for the copy should be divided, &c.* a kind of implication, that he had left the printing thereof to the discretion of his executors.

The above-mentioned writer further observes (*q.*), that his unwillingness to have any of his works printed after his death, proceeded from an apprehension, lest they should undergo any expurgations or interpolations in the licensing them; for this, he said, *might in matters of law prove to be of such mischievous consequence, that he was resolved none of his writings should be at the mercy of the licensers.*

But as there is no such thing required by the laws now in being, that reason is at an end, and the reader may be assured, that the edition here offered to the public is printed faithfully from the author's original manuscript.

This manuscript consists of one thick folio volume, all in our author's own hand-writing, from whence it was transcribed in his life-time, and the transcript has since been bound up in seven small volumes in folio.

It had been by him revised as far as *Chap. 27.* in the first part, *viz.* about the middle of the third volume, as appears from many interlineations and additions in his own hand; the corrections in the remaining part are in another (very modern) hand, and in some places not very agreeable to the scope of the argument.

This transcript, therefore, so far as revised and corrected by our author (and no farther), may be deemed the original finished and perfected; but since even in this part there are in some places leaves taken out, and others inserted in their room in a different hand, unauthenticated by our author, and sometimes quite disturbing the coherence and connexion of the discourse, it was not thought warrantable to consider such interpolations as a part of this treatise; for as it cannot be doubted but great regard will be always paid to the performance of so esteemed an author, it is a piece of justice due both to the author and the public, that nothing should be herein inserted, but what is undeniably his, and carries evident marks of being by him intended as part of this work.

The title hereof was named by our author himself *Historia Placitorum Coronæ*; for he intended, as appears from the *Proemium*, to have taken in the whole body of the crown-law, as well in relation to matters civil, as matters criminal; for which purpose he once designed to have added two more books upon this subject, the one concerning offenses not

capital, the other touching franchises and liberties; but to the great detriment of the public, neither of these appears ever to have been composed by him; so that, as it now stands, it treats only of offenses capital, which is indeed the most important branch of the crown-law, being what most nearly affects the life and liberty of the subject; besides, in treating hereof, he has unavoidably explained many incidental matters equally applicable to offenses not capital.

The *first* part of this work relates to the nature of the offenses, *viz.* the several kinds of *treason*, *heresy* and *felony*, the second of these, *heresy*, being an offense of a spiritual nature, of which it was not our author's purpose to treat, was at first wholly omitted by him; but afterwards considering, as I suppose, that by its being circumscribed by act of parliament, *viz.* 1 *Eliz.* it became an offense of temporal cognizance, he thought proper to insert a chapter upon that head.

The *second* part relates to the manner of proceeding against offenders; wherein are considered the jurisdiction of the several courts; the manner of apprehending, committing, bailing, and arraigning offenders; their several pleas, bringing them to trial, judgment, and execution.

Having thus given some general account of the author and the work, it will be proper, in the next place, to acquaint the reader with the part I have had in this edition, which has been to supervise the printing thereof, that it be agreeable to our author's manuscript, which being written in a very obscure hand, might, by one wholly unacquainted with the law, have been frequently mistaken.

To make this work the more authentic, the several references herein made to the records have been compared with the originals at the respective offices in the *Tower* and *Westminster*.

I have also carefully examined the several quotations from the year-books, reports, &c. many of which being quoted without folio or page, or else mis-quoted, have with no small trouble been supplied and rectified; for our author, not having always had leisure to consult the books themselves, has frequently copied from the mis-printed quotations in the margin of lord *Coke's* third volume of his *Institutes*.

As it cannot be expected, but in the writing so large a manuscript, some words must, *currende calamo*, have been omitted or wrong written, I have in some few places taken the liberty to add or alter a word or two to preserve the sense; but have been particularly careful to distinguish such addition or alteration within crotchetts, that I might not impose my judgment on the reader, but leave him to judge for himself, whether the drift of our author's reasoning do not require it.

I have likewise subjoined a few notes, containing some observations from the records; as also remarking, where the law hath been since explained

explained by later resolutions, or altered by subsequent acts of parliament; but as these acts are sometimes very long, consisting of many clauses, the reader is desired to use the same caution here, which is recommended by our author (r.) with regard to those recited in the work itself, *viz.* "that he rely not barely upon the abstracts thereof here given, but peruse the statutes themselves in the books at large."

I am sensible many slips and omissions must needs have happened in the supervising so large a work of so critical a nature, but hope that will plead my excuse, at least to those, who consider the wide difference between perusing it in a fair print and in a difficult manuscript,

(r.) Part I. p. 262.

March 30,
1736.

S. E M L Y N.



A

T A B L E

o f

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T H E

P R O E M I U M.

The Method of the Work intended.

HAVING an intention to make a full collection of the *Pleas of the Crown*, I shall divide those Pleas into two general Tracts.

The first, concerning pleas of the crown in matters *criminal*.

The second, concerning pleas of the crown in matters *civil*; namely, concerning franchises and liberties.

The former will be the subject of the first and second books, the latter of the third book.

First, therefore, I shall begin with the several kinds of *crimes*, that make up the subject matter of my first and second book.

Crimes that are punishable by the laws of *England*, are for their matter of two kinds,

1. *Ecclesiastical*.
2. *Temporal*.

The former of these, namely, such crimes as I call *Ecclesiastical*, are of ecclesiastical cognizance; and though all external jurisdiction, as well ecclesiastical as temporal, is derived from the Crown of *England*, and all criminal proceedings in the ecclesiastical courts, are in some kind *Placita Coronae* suits for the king, and such as he may pardon or discharge, as being his own suits, yet these I shall not meddle with at this time.

The

THE PROEMIUM TO

The second sort, *viz.* *Temporal* crimes, which are offenses against the laws of this realm, whether the common law or acts of parliament, are divided into two general ranks or distributions in respect of the punishments that are by law appointed for them, or in respect of their nature or degree: and thus they may be divided into capital offenses, or offenses only criminal; or rather, and more properly, into

Felonies and

Misdemeanors,

because there is no capital offense but hath in it the crime of felony; and yet there be some felonies, that are not in their nature capital, whereof hereafter,

Crimen capitale, or felony, in this acceptation is of two kinds, namely,

That which is complicated, and hath a greater offense joined with it, namely *Treason*, and

That which is simple *Felony*.

Touching the former of these, namely *Treason*, it is that capital offense, which is committed against some special civil obligation, of subjection and faith more than is found in other capital offenses, and therefore it hath the denomination of *proditio*, and the offense is laid to be done *proditoris*.

This offense of *Treason* is of two kinds, namely,

That which is against the highest civil obligation, namely, against the king, his crown and dignity, which is called *High-treason*.

Or against some other, to whom a civil obligation of faith is made or implied, which is called *Petit-treason*.

The offenses of high-treason are of two kinds, *viz.*,

Such as were treasons by the *common law*, or,

Such as were made so by special *acts of parliament*.

The offenses of simple felony are likewise of the same distribution, namely,

Such as were felonies at *common law*, and,

Such as are by *act of parliament* put into the degree, or under the punishment of felony.

And the same distribution is to be made touching *misdemeanors*, namely they are,

Such as are so by the *common law*, or

Such as are specially made punishable as *misdemeanors* by *acts of parliament*.

This

HISTORIA PLACITORUM CORONÆ.

This is the general order and distribution of the first and second book of this tractate, namely, concerning the matters of the Pleas of the Crown in criminals ; or those crimes, which come under the cognizance of the laws of this kingdom, wherein the prosecution is *pro rege*, or in his name or right, as the common *vindex* of public injuries or crimes.

The particular enumeration of these several offenses is much of the busines of those charges, that are given to the grand jury by the justices in their several sessions ; and they were for the most part heretofore contained in certain articles or heads of inquiry delivered out in writing to the several inquests, and were often stiled *Capitula Placitorum Coronæ*; such were those of R. 1. mentioned by *Hoveden*, p. 744, 783. which were delivered to the inquisitors in every wappentach or hundred, and to the justices itenerant to make inquiry upon, and by them to the grand inquests ; and such were those *Articuli itineris* declared by *Bracton*, Lib. III. de coronâ, cap. 1. and printed in the old *Magna Charta* for the justices in eyre to make inquiry upon, which I shall not here repeat at large, but shall take them up as I shall have occasion to use them.

The order which I shall observe in these *Pleas of the Crown* will be this :

I. In the first book I will consider of *capital* offenses, *Treason* and *Felonies* ; which book will be divided into two parts :

1. The *enumeration of the kinds* of treasons and felonies as well by common law, as by acts of parliament.
2. The *whole method of proceedings* in or upon them.

II. The second book will treat of matters criminal, that are *not capital* ; and,

III. The third book will be touching *franchises* and *liberties* (*).

* That which is here offered to the public, is only the first of these books, consisting of two parts; the other two books having, as I have been credibly informed, never been composed by our author.



HISTORIA PLACITORUM CORONÆ.

PART I.

CHAP. I.

Concerning Capital Punishments.

B EING to treat concerning capital offences, it will not be amiss to premise something touching capital punishments.

Laws, that are introduced by custom, or instituted by the legislative authority for the good of civil societies, would be of little effect, unless they had also their sanctions, imposing penalties upon the offenders of those laws.

These penalties are various according to the several natures of the offenses, or the detriment that comes thereby to civil societies; some are only pecuniary; some corporal, but not capital, such as imprisonment, stigmatizing, banishment, servitude, and the like; others are capital, *ultimum supplicium*, or death; and that death sometimes accompanied with greater, sometimes with less degrees of severity.

So that, altho offenses against the good of human society be many of them prohibited by the laws of God and nature, yet the punishments of all such offenses are not determined by the law of nature to this or that particular kind, but are for the most part, if not altogether left to the positive laws and constitutions of several kingdoms and states.

And therefore, altho most certainly the penalties instituted by God himself among his antient people upon the breach of their laws were

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with the highest wisdom fitted to that state, and all laws and instituted punishments should come up as near to that pattern, as may be; yet as to the degrees and kinds of punishments of offenses *in foro civili vel judiciorio* they are not obliging to all other kingdoms or states, but all states, as well christian as heathen, have varied from them.

And therefore it will not be amiss to instance in the various kinds of punishments inflicted by the several laws of several countries, especially in those two offenses of *homicide* and *theft*, which are the most common and obvious offenses in all countries.

By the antientest divine law, that we read, the punishment of homicide was with death. *Gen. ix. 6. Whoever sheds man's blood, by man shall his blood be shed (a).*

And the judicial law given by *Moses* was pursuant to it, with some temperaments and explanations. *Exod. xxi. 12, 13, 14. He, that smiteth a man, so that he die, shall surely be put to death. And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place, whither he shall flee. But if a man come presumptuously upon his neighbour to slay him with guile; thou shalt take him away from mine altar, that he may die.* And v. 18, 19. *And if men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed; if he rise again, and walk abroad upon his staff, then shall he that smote him, be quit; only he shall pay for the loss of his time, and for his cure.*

And what this delivery by God of a man into his neighbour's hand is, is best expounded *Deut. xix. 4, 5, 6, 11, 12. Who so killeth his neighbour ignorantly, whom he hated not in time past, As where a man cleaveth wood, and the ax flieth from the helve, and killeth a man,*

[3] *he shall fly to the city of refuge (b), lest the avenger (c) of blood pursue, and slay him while his heart is hot; whereas he was not worthy of death, in that he hated him not in time past: But if any man hate his neighbour, and lie in wait for him, and rise up against him, and*

(a) This law being given to *Noeab*, from whom all men are derived, is not peculiar to the *Israelites*; but, as our author observes below, is binding on all mankind.

(b) Concerning these cities of refuge, see *Exod. xxii. 13. Numb. xxxv. Deut. iv. 41. Et seq. Job. xx. xxi. Selden: de jure naturali, &c. Lib. IV. cap. 2.*

(c) Who this avenger of blood was, is no where expressly laid; it is generally supposed that he was the next heir to the

person slain. See *Selden: de jur. nat. Lib. IV. cap. 1. Et de successoribus in bona defuncti*; but the truth is, the Hebrew words *Gool ha dam*, here rendered the *avenger of blood*, should be rendered *the next of blood*, for *Gool* properly signifies one of the *same kindred*; it is so rendered *Ruth ii. 20.* and iii. 9, 12, and is usually expressed in the Septuagint by *ογκιστων*, which denotes *one near of kin*.

HISTORIA PLACITORUM CORONÆ 3.

smite him mortally, that he die, and he fleeth to one of those cities, the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die (d).

Again; *Exod. xxii. 2. If a thief be found breaking-up, and be smitten, that he die, there shall no blood be shed for him; if the sun be risen upon him, there shall blood be shed for him; for he should make full restitution; if he have nothing, then he shall be sold for his theft.*

Upon these judicial laws, these things are observable; 1. That by these laws the killing of a man by malice forethought, or upon a sudden falling out, were both under the same punishment of death (e). 2. That the killing of a man by misfortune was not liable to the punishment of death, by the sentence of the judge; but yet [4] the avenger of blood might kill him, before he got to the city of refuge (f) 3. The killing of a thief in the night was not liable to punishment of death; but if it were in the day-time, it was punishable with death. 4. Tho there is no express law touching killing a man in his own defense (g), yet it seems the custom of the Jews, and the

B 2

(d) If there was no avenger of blood, or if he would not or could not kill the slayer, the slayer was capitally punished by a judicial sentence; and no ransom or recompence was admitted. *Numb. xxxv. 31. Selden: de jur. nat. Lib. IV. cap. 1. in fine*; even tho the person slain should before his death desire that the slayer should be forgiven. *Maimonides More Neuchim, Pars III. c. 41.* for all voluntary homicide was inexpiable, as appears from *Numb. xv. 27. 31.* and the case of *David* in the matter of *Uriah*, *P. f. li. 16.* There was one case indeed of capital homicide, wherein a ransom was allowed, viz. If an ox were wont to push with his horn, and it had been testified to his owner, and he had not kept him in, so that he had killed a man or a woman, the owner was to be put to death, he being looked on as the author of the murder, who would not prevent it, when he had warning, and might have done it; however, this being a case of gross negligence, rather than wilful malice, he was permitted to redeem his life by paying the ransom, which was laid upon him. *Exod. xxi. 29. 30.* the price of a servant was thirty shekels of silver. *Abid. v. 32.* and that of a freeman was generally double, viz. sixty shekels. *Maimon. More Neuchim, Pars III. cap. 40.*

This was also felony by the common law of England, for by such sufferance the owner seemed to have a will to kill. *Stans. P. C. 17. Fitz. Cor. 311.*

(e) The law was general, *That whoever smiteth a man, so that he die, shall surely be put to death, Exod. xxi. 12.* There were indeed

some exceptions from this general law, but, setting aside the case of an house-breaker in the night, they all related to casual involuntary homicides; there is not one exception of a voluntary designed killing, whether sudden or premeditated; whatever interpretations might be afterwards made by the Jewish Rabbis, who made the commandments of God of none effect thro' their traditions, *Matt. xv. 6.* so that there is nothing in the Jewish law to countenance the distinction made by the laws of England between murder and manslaughter; a distinction, which serves to shew, that tho the laws of England be much severer than the other in the case of theft, yet they are much milder in the case of homicide.

(f) Unless he fled to the altar, which was also looked on as a place of refuge, it being probable from *Exod. xxi. 13. 14.* that the altar was the place of refuge before the cities of refuge were appointed. See *Selden: de jur. nat. Lib. IV. cap. 2.* If he did escape to the city of refuge, he was obliged to remain there till the death of the high priest, for the avenger of blood might kill him, wherever he found him out of the borders of the city. *Numb. xxxv. 25—32. Selden: ubi supra & de Synedris, Lib. II. cap. 7.* But after the death of the high-priest, he was at liberty to go where he would; for the reason hereof see *Maimonides More Neuchim, Pars III. cap. 40.* and *Ansfauth on Numbers xxxv. 25.* (g) This was a case so plainly justifiable by the law of nature, that it needed no positive law; however, the permission to kill

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interpretation of the Jewish doctors, excused that fact from the punishment of death (*h*). 5. That the usual manner of the execution of the sentence of death was stoning, and sometimes strangulation (*i*).

Now I will consider some of the laws of other nations in reference to *homicide*; wherein tho there is a great analogy in many things between the laws of the Jews, and the laws of other countries; so that a man may reasonably collect, that these judicial laws of the Jews were take up by other nations, as the grand exemplar of their judicial laws; yet in some things they departed from them in the particular constitutions and customs of other countries.

Among the *leges Atticae* collected by Mr. Petit, *Lib. VII. tit. 1.* there were many of the laws concerning homicide.

[5] *Senatus Areopagiticus jus dicit de cædo, aut vulnere, non casu, sed voluntate inflicto; de incendio item, & male veneno hominis necandi causa dato.*

Thesmophoræ in homicidas animadvertisunt.

Si quis hominem sciens morti duit, capital est.

Qui alium casu fortuito necâssit, in annum deportator, donec aliquem & cognatis occisi placârit; revertitor vere peractis sacrâs & lustrationibus.

Si quis imprudens in certaminibus alium necâssit, aut infidiantem aut ignotum in prælio, aut in uxore, vel matre, vel sorore, vel filia, vel concubina, vel eis, quam in suis liberis, habet deprehensum, cædis ergo ne exultato.

Si quis alium injuste vim inferentem incontinenti necâssit, jure cæsus est.

Si quis homicidam foro, urbis territorio, publicis certaminibus & sacrâs Amphiælyonicis abstinentem occiderit, aut mortis causam prebuerit, perinde ac si Atheniensem civem necâssit, capital est, & Ephetae jus dicuntur. So that by this law a man conscious to himself of homicide might, before he was apprehended, undertake a voluntary exile, and during such an exile was privileged from the penalty of homicide (*k*).

Kill a thief, who should be found breaking up in the night, seems to be an express allowance of killing in one's own defence; for the reason of that law is manifestly founded on the principle of self-preservation. *Nom adversus periculum naturalis ratio permittit se defendere.* Diggit. Lib. 9. Tit. 2. t. 4.

(*b*) When done in defence of life or chastity; because, when lost, they are irreparable. See Soden: de jur. natur. Lib. IV.

cap. 3. Maimon. Mor. evocibim, Pars III. cap. 40.

(*i*) Sometimes the execution was by burning; as in the case of a priest's daughter, who had played the whore. Lewis. xxi. 9. Sometimes by decollation, which was the usual way for murder. Soden: de Syndrict, Lib. II. cap. 13. De jur. natur. Lib. IV. cap. 1.

(*k*) This was the case of Theseus in Homer Odys. v. v. 224, 270. &c. v. 117.

Homicidas

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§

Homicidas morte multanto in patria occisi terra, et abducunt, ut lege cautum est; in eos ne servirunto, neve pecuniam (!) exigunt.

Before judgment the kindred of the party slain that prosecuted the manslayer might compound the offense, and release the offender, but after judgment once given, neither the judge nor prosecutor could remit it (m).

Cædis ne postulator unquam is qui homicidam exulantem & redeuntem quo non licet, in jus ad magistratum rapuerit aut detulerit.

And codem libro tit. 5. si non furtum fecit, si im aliquis occisit, [6]
jure cæsus esto, according to the *Mosaical law*, and from thence transcribed into the *Attic laws*, and from thence by the *Decemviri* into the *Roman laws* of the twelve tables *in totidem verbis*.

Among the *Romans* the laws concerning homicide differed in some things both from the *Jews* and *Greeks*, as appears *Digest. Lib. XLVIII. tit. 8. Ad legem Corneliam de sicariis & beneficiis.*

Qui hominem occiderit punitor non habita differentia ejus conditionis hominem (n) intercemit.

*Qui hominis occidendi furtive faciendi causâ eum telo ambulaverit (o)
qui hominem non occidit sed vulneravit ut occidat, ut homicida damna-
dus, nam si gladium strinxerit & cum eo percusserit, indubitate occidendi
animo admisit, sed si clavi aut cucuma in rixa, quamvis ferro, percus-
serit, tamen non occidendi animo lenienda pœna ejus, qui in rixa casu
magis, quam voluntate, homicidium admisit (p).*

But if it were merely by misfortune, it was not punished (q).

*Qui stuprum sibi vel suis per vim inferentem occidit, dimittendus est,
(r), sed is, qui uxorem in adulterio deprehensam occidit, hunciliore loco
positus in exilium perpetuum dandus, in aliqua dignitate positus ad tem-
pus relegandus (s).*

(1) The Greek word ἀριών here rendered *peccatum*, properly signifies a ransom. *Bom. Iliad. a. v. 13, 20, 23, 95.* for by the ancient law of Greece the punishment of homicide was redeemable by the payment of a sum of money to the relations of the slain, which recompence was term'd *aversio* or *sewá*. *Homer. Iliad. l. vi. 628. o. vi. 498.*

(m) That this was the meaning of the foregoing law, see *Petit in leges Atticas, Lib. VII. tit. 1. p. 509.* See also the *Oratio de Demophonen against Aristocrates*, wherein most of the *Atticæ* laws relating to homicide are explained.

(n) *I. i. §. 2.*

(o) *I. i. pr. & Cod. ord. tit. Lib. IX. tit. 26. l. 7.*

(p) *I. i. §. 3.*

(q) *I. i. §. 3. e. g.* If a man, who was cutting a tree, should without calling out throw down a great branch of it upon one who was passing by, and kill him, he was to be acquitted, that is to say, he was not to be proceeded against criminally by the *lex Cornelia de sicariis*; for so is the expression in *l. 7 ad bujde legis coercitionem non pertinet*; but still he was liable by the *lex Aquilia* to make a pecuniary satisfaction for the damage. *Instit. Lib. IV. tit. 3. §. 5.* And tho' that law mentions only the case of killing a slave, yet there lay an *urilis actio* in the case of killing a freeman. See *Nocht ad Leg. Aquil. cap. 2.*

(r) *I. i. §. 4.*

(s) *I. i. §. 5.*

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*Furem nocturnum qui occiderit, impune feret, si parcere ei sine periculo suo non potuit (t) ; which law, tho' like to that of the Jews and [7] Greeks, the Roman lawyers have construed (u), that it is lawful to kill *furem nocturnum recedentem & fugientem cum rebus, licet se non defendat telo, sed non diurnum, nisi se defendat telo.**

The punishment of homicide, unless it were merely casual, among the Romans was *deportatio in insulas & omnium bonorum ademptio, sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut paenam legis suffineant; humiliores enim solent bestiis subjici (x); altiores vero deportantur in insulas (y).*

Some temperaments they added in other cases of homicide, as banishment for five years (z), deportation, &c. but regularly the punishment of homicide, unless in case of simple misfortune (a), or defense of life (b), was death viz. *bestiis subjiciantur.*

Among the Saxons (c) the punishment of homicide was not always, nor for the most part capital; for it might be redeemed by a recompence which went under the name of *Wera* and *Weregild* (d), which

(t) *L. 9.*

(u) This was not a meer construction of the Roman lawyers, but is expressly provided by the law of the twelve tables, as appears from *Digest. Lib. IX. tit. 6. ad leg. Aquil. l. 4. §. 1. Cic. pro Milone, cap. 3. A. Gell. Lib. 18. cap. Macrob. saturnal. Lib. I. cap. 4.* The reason of this distinction between a night-thief and a day-thief, see in *Grat. de jur. bel. ac. pac. Lib. II. cap. 1. §. 12.*

(x) *Dig. Lib. XLVIII. tit. 19. de paenit. L. 28. §. 15.*

(y) *Dig. ad leg. Cernil. de scariis l. 16.*

(z) *I. 4. §. 1.*

(a) *Cod. eod. tit. I. 1.*

(b) *Cod. eod. tit. I. 2. & 3.*

(c) It seems to have been the general practice of most of the northern nations to commute the punishment of the most heinous crimes for a pecuniary mulct. *Lindenbrugii Codex Leg. Antiq. Lib. IV. cap. 36. Tacitus* speaking of the antient Germans says, it was customary among them to punish homicide with a certain number of sheep and oxen, out of which the relations of him that was slain received satisfaction. *Tac. de mor. Germ. cap. 21.* From hence probably our Saxon ancestors brought the custom into Britain.

(d) This *Wergild* or *capitis estimatio*, according to the laws of *Ebelbert*, was usually 200. *Leg. Ebelbert, l. 21.* tho' in some particular cases it was more, *l. 5. 6. 22.* If the slayer escaped, the relations

were to pay half the ordinary *Wergild*. *l. 23.*

By the laws of *Ina* the *Wergild* was different according to the rank and degree of the person killed, of a man worth 200s. was 30s. of a man worth 600s. was 80s. of a man worth 1200s. was 120s. *Leg. Ina. l. 70.* This rule admitted of some exceptions, *l. 34. l. 74.*

By the laws of *Alfred*, the bare attempt on the king's life was punished with death, unless the offender redeemed it by the payment of the king's *wergild*: the same law was in case a slave attempted the life of his lord, unless he redeemed it by paying his lord's *wergild*. *Leg. Alfred. l. 4.* the *wergilds* were of the same value, as under *Ina*. *Leg. Alfred. l. 9. l. 26.*

By the league between *Alfred* and *Gutbrun*, *l. 2.* the value of a common person was 200s. the same by the league between *Edward* and *Gutbrun* in fine.

By the laws of *Atelstan*, whoever should attempt his lord's life, was to be put to death, and there is no mention made of any ransom. *Leg. Atelstan, l. 4.* but at the end of his laws, and of the *Judicia Civitatis Lundoniorum*, there is a particular account of the *wergilds* of all orders and degrees, from the king to the peasant, for which see *Wilkin's Leg. Anglo-Sax. p. 64. p. 71.*

By the laws of *Ethelred*, *l. 5.* the *wergild* of a common person was increased to 25 pounds. By *l. 8. Gul. Cong. apud Wilkin's, p. 221.* it was twenty pounds.

By

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which was a rate set down upon the head of persons of several ranks; and if any of them were killed, the offender was to make good that rate, or *Weregild* or *capitis estimatio*, to the kindred of the party slain; or, as some think, part to the king, part to the lord of the fee and part to the relations of the party slain; which if he could not do, he was to suffer death (e). *Vide Spelm. in Gleff. ad verba Wera & Weregild.*

This custom continued long, even to the time of Hen. I. here in *England*, as appears by his laws *in libro rubro*, *scit. 11. (f)* but shortly after grew obsolete, as being too much contradictory to the divine law (g). *Vide Covarr. Tomo 2 Lib. 11. cap. 9. scit. 2.*

But although the custom of *Weregild* is abrogated here in *England*, and by the laws of this kingdom the punishment of homicide is regularly death (h), as shall hereafter be shewn; yet since there are in *England* two kinds of proceedings in punishing of homicide, the one at the suit of the heir or wife by appeal, the other at the suit of the king by indictment, the capital punishment of the offender may be discharged by all parties interested, namely by the appellant by release, and by the king by his pardon.

By the laws of *Cnute*, whoever should lie in wait for the life of the king, or of his lord, was to suffer death, and forfeit all he had. *Leges Cnuti, l. 54.* Whoever committed a public notorious murder, was likewise to suffer death, without redemption: for in *l. 61. Cedex publica & demini predictio* are reckoned amongst the *felicia inexplicabilia*; but it should seem that common homicide was redemable; for in *l. 6.* it is said, *Homicidæ inclinat, vel emendat, vel scienter in peccatis moriantur.*

(e) The *weregild* was usually divided into three parts: the first, which was called *Frið bøte*, was paid to the king for the loss of his subject; the lord had another for the loss of his man, which was called *Man-bøte* and the kin of the slain for their loss had the third part, which was called *Mæg-bøte*. See *Spelm. life of Alfred, Book II. §. 11.* In the case of killing the king, besides the *weregild*, which was to be paid to the king's relations, there was also another payment called *cynibot* or *cynghild*, to be made to the public for the loss of their king.

(f) And § 12. see *Wilkin's leges Anglo-Sax.* p. 244. But it appears from the same laws, *l. 71. ibid. p. 267.* that a malicious murder, by poison or the like, was *fæatum mortiferum nullo modo redimendum*: The genuineness of these laws is justly questioned, for that they not only are in the nature of commentaries rather than laws; but also in *l. 5.* *Gregory's decretals* are cited, which

were not compiled till fifteen years after the death of *Henry I.* however, they are allowed to be very antient, and to contain the usages of the *Anglo-Saxons*. See *Hicks's Differt. Epist. p. 96.*

(g) It cannot but seem strange to us at this time of day, that the wilful murder of any one, much more of the king, should be punished only with pecuniary mulct; to solve this difficulty. Mr. *Rapin* supposes that this commutation was allow'd only in the case of simple homicide; or at most what is now known by the name of manslaughter, but not in the case of a premeditated murder: See *Rapin's Histoire d'Angleterre, Vol. I. p. 520.* This notion is in itself reasonable, and seems to be favoured by *l. 4. of Athelstan*, and *l. 54. of Cnute*, which makes it capital barely *infidari regi vel domino*, much more to take away the life of the king or his lord; but on the other hand it seems somewhat hard to suppose, that among so many laws against homicide, they should all be levell'd against casual or sudden killing only, and scarce any against wilful murder.

(h) The offender is to be hanged by the neck till he be dead; and in case he was convicted on an appeal, the antient usage was, that all the relations of the slain should drag him with a long rope to the place of execution. *3 Co. Inf. 131. Plowd. 306, b. 11 Hen. 4. 12. a.*

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And thus far touching the punishment of homicide.

Now I shall consider somewhat also of the punishment of theft, and the various laws and usages concerning the same in several kingdoms and states, and at different times in the same state or kingdom.

By the Jewish law, Exod. xxii. 1, 4. *If a man steal an ox or a sheep, and sell or kill it, he shall restore five oxen for an ox, and four sheep for a sheep: If the theft be found in his hands alive, whether ox, ass, or sheep, he shall restore double; and the like for other goods* (i); so that there was no capital punishment in case of theft, though it were accompanied with burglary, as breaking a house, (but men-stealers were punished with death (k); but it seems by the civil constitutions of that state the punishment thereof was sometimes enhanced, at least in some circumstances, sometimes to a seven-fold restitution, Prov. vi. 31, and also to death, 2 Sam. xii. 5. (l)

Now as to the Attic laws: *Samuel Petit de Legibus Atticis, Lib. VII. tit. 5.* gives us an account of their laws concerning theft, in some things differing, in some things agreeing with the Jewish laws, *furem*

[10] *cujus cunque modi furti supplicio capitis punito.* This was Dra-co's law; but it was thought too severe, and therefore Solon corrected it (m) *Si furtum factum sit, & quod furto perierat receperit dominus, duplione luto furtum qui fecit & quorum ope consilioque fecit; decuplione vindicator, ni dominus rem furtivam receperit, in nervo quoque habetor dies ipsos quinque totidemque noctes, si heliaста pronunciariint; pronuncianto autem, cum de pena illius agitur.*

Si luci furtum cuius aestimatio sit supra 50 drachmas faxit, ad undecim viros rapitor; si non furtum faxit, si im aliquis occidit, jure cæsus est:—Manifestum hujusmodi furtum qui faxit, etiam si vades dederit, non nonæ factæ sarcitione, sed morte luto. Si quis item ex aliquo gymnasio uestis aut lecythi aut alicujus vel mynimæ rei, aut supellectilis è gymnasio, aut ex balineo, aut è portubus, quod excedat 10 drachmarum aestimationem, furtum faxit, morte luto.

Manifesti saccularii (n) morte luunto.

(i) Exod. xxii. 7, 9. The reason why the restitution of an ox was more than of a sheep is supposed by Maimonides *more Novachim Par. III. cap. 41.* to be because sheep are more easily guarded against thieves than oxen, who feed at a greater distance one from another.

(k) Exod. xxi. 16.

(l) Thus passage from the book of Samuel does by no means prove what it is brought for, viz. that theft was punishable with death by the Jewish law; for the case

there put of taking away a poor man's lamb, was attended with violence and other aggravating circumstances, which provoked king David to say, *The man that hath done this shall surely die;* and some render the words, *Does deserve to die;* but at most it only proves the vehemence of David's anger at the man, and not what was the law of the Israelites.

(m) See A. Gellium, Lib. XI. cap. 18. & Plutarch. in *Vita Solonis.*

(n) *Sacerdoti quoniam, A cut-purse.*

Nisticularii

HISTORIA PLACITORUM CORONÆ. 10

Pecticulare (o) manifesti morte luunto.

Plagiarii (p) manifesti morte luunto.

In hortos irrumpere falsoque deligere capital est (q): So that the quantity of the thing stolen, the place, the season, the manner and other circumstances heightened theft into a capital punishment, that otherwise by Solon's laws was only pecuniary and imprisonment (r).

Now as to the *Roman* laws: For a theft that was not *furtum manifestum*, there is given *actio in duplum*; but if it were [11] *furtum manifestum, actio in quadruplum (f)*; *furtum autem manifestum est, cum fur deprehenditur in furto (i)*.

But now as to punishments among the *Romans*, there were these degrees or orders: I. Capital punishments, (*viz ultimum supplicium*) (u) which were 1. *Damnatio ad furcam*. 2. *Vivi crematio*. 3. *Capitis amputatio*. 4. *Damnatio ad feras*. II. Others, that were in the next degree, were 1. *Cocrcitio ad metalla*. 2. *Deportatio ad insulas*. III. Others again of a lower allay were, 1. *Relegatio ad tempus vel in perpetuum*. 2. *Datio in publicum opus*. 3. *Fustigatio (x)*.

I find not among the *Romans* any greater punishment of theft, than four-fold restitution (y) unless in these cases:

1. *Si quis ex metallo principis vel ex monetâ sacrâ furatus est, pœna metalli & exilii punitor (z)*.

(o) Τυρχηπχν, A house-breaker.

(p) Ἀνδεανδεωμεν, Sive Plagiarus, is ei, qui sine vi, dole male sciens abducit homines liberas & ingenuas, vendique pro servis, aut seipsum: vel is est, qui alienos servos abducit sine vi, & plenariae sine furo, & fugam perjuaret, aut fugitione celat. Petit, Comment. ad Lib. VII. tit. 5. de furtis.

(q) But this was a temporary law, made in a time of dearth, when it was thought necessary to prohibit the exportation of Figs. However, prosecutions of offenders against this law soon grew odious: from hence all malicious informers were called *Sycophants*. Vide *Athenæi Deipnosophistæ*, Lib. III. & *Scholiast. in Aristophanis Platoni ad v. 31. & 874.*

(r) Among the *Lacedemonians* all manner of theft was permitted, as a practice which tended to instruct their youth in the strangeness of war. *A. Gel. Lib. XI. cap. 18.* It was also unpunished among the ancient *Egyptians*. *A. Gel. sibi supra.* But we learn from *Diodor. Sic. Lib. I.* that it was allow'd only on certain conditions, for it was provided by a law, that whoever was minded to follow the trade of thieving, should first enter his name with the captain of the gang, and should bring in all his booty to him, that so the right owner might know where to apply for the recovery of his goods, which were re-

stored to him on paying the quarter of the value.

(f) *Inst. Lib. IV. tit. 6. §. 5. Digest. Lib. XLVII. tit. 2. de furtis. l. 46. §. 2.* Herein the *Roman* law greatly resembled the *Jewish*, with this difference that by the *Jewish* law the punishment of four-fold was to be instead of restitution; whereas by the *Roman* law the thing stolen was recoverable over and above the *pœna quadrupli*. *Dig. cod. tit. l. 54. §. 3.*

(i) *Dig. cod. tit. l. 2. l. 3. pr.* By this was meant not only if he was taken in the fact, but also if he was apprehended with the goods upon him before he had carried them to the place, where they were to remain that night, and answers to the expression in our law, of being taken in the *matinasse*.

(z) *Dig. Lib. XLVIII. tit. 19. de penit. l. 21.*

(x) *Dig. cod. tit. l. 28. pr. §. 1. l. 11.*

(y) So far were the *Romans* from inflicting capital punishments for theft, that on the contrary it was expressly forbidden by *Justinian*, that any person should be put to death, or suffer the loss of member for theft. *Novel CXXXIV. cap. ult. Jul. peculatorius, l. 6. §. 2. Lib. XLVIII. tit. 19. de penit. l. 38.*

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2. *Graffatores qui cum ferro aggredi & spoliare instituunt, capite puniuntur (a).*

3. *Famuli latrones ad bestias vel furcas damnantur. Digest. de paenit. (b).*

If we come to the laws and customs of our own kingdom, we shall find the punishment of theft in several ages to vary according as the offence grew and prevailed more or less (c).

[12] Among the laws of king *Athelstan*, mentioned by *Brampton*, p. 849, 852, 854. *Non parcatur alicui latroni supra 12 annos & supra 12d. quin occidatur (d).* *Edmund* his successor *, *præcepit non infra 15 annos, vel pro latrocínio infra 12d. occidatur, nisi fugerit, vel se defenderit*: *Malmesbury* tells us, that in the time of *William I.* theft was punished with castration, and loss of eyes (e); but in the time of *Henry I.* the antient law, which continues to this day, was *ut quis in furto vel latrocínio deprehensus fuerit suspenderetur (f)*.

(a) *Dig. cod. tit. I. 28. §. 10.*

(b) *Dig. cod. tit. I. 28. §. 15.*

(c) By the laws of *Ethelbert*, if one man stole any thing from another, he was to restore three-fold, besides a fine to the king, l. 9. If he stole any thing from the king, he was to restore nine-fold, l. 4.

By the laws of *Ias* a thief was punished with death, unles he redeemed his life *capiatis estimatio* l. 12. which wes 60s. l. 7. but if a villain, who had been often accus'd, should be taken in a theft, he was to have a hand or foot cut off, l. 18.

By the laws of *Alfred* whoever stole a mare with the foal, or a cow with the calf, was to pay 40s. besides the price of the mare or cow, l. 16. Whoever stole any thing out of a church, was to pay the value, and a fine according to the value; and also was to have that hand cut off, which committed the fact, l. 6. If any person committed a theft *die Dominicis*, or any other great festival, he was to pay double l. 5.

(d) By the first law of *Athelstan* it was but 8d. *Wilkins leges Anglo-Sax. p. 56.* but afterwards by the laws of the same king, enacted at *London*, and thence called *iudicia civitatis Londonia*, no one was to be put to death for a theft under 12d. *Ibid. p. 65.* But in case the thief fled, or made resistance, then he might be put to death, tho' it were under that value, *Ibid. p. 70.* By the law of *Cnute* theft was punished with death, *Ibid. p. 134. l. 4. and p. 143. l. 61.*

(*) This is a mistake, for no such law is found among the laws of that king, but it is among the later laws of king *Athelstan*,

Vide iudicia Civ. Lond. Wilk. leg. Anglo-Sax. p. 70.

(c) By the laws of *William I.* it was expressly prohibited, that any should be hanged or put to death for any offence, but that his eyes should be pull'd out, his testicles, hands or feet cut off, according to the degree of his crime, l. 67. *apud Wilkins Leg. Anglo-Sax. p. 229. p. 218.*

(f) In former times, tho' the punishment of death was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9th year of *Hen. I.* it was enacted, that whoever was convicted of theft (or any other felony, 3 Co. *Instit. 53.*) should be hanged, and the liberty of sedemption was entirely taken away. *Wilk. leg. Anglo-Sax. p. 304.* This law still remains at this day; but considering the alteration in the value of money, the severity of it is much greater now than then, for 12d. would then purchase as much as 40s. will now; and yet a theft above the value of 12d. is still liable to the same punishment; upon which *Sir Hen. Spelman* justly observes, that while all things else have rose in their value and grown dearer, the life of man is become much cheaper. *Spelm. in verba lexicis;* from hence that learned author takes occasion to wish, that the antient tenderness of life were again restored *Iustum certe est, ut colapsa legis equitas restituatur, & ut divisa imaginis veibulum, quod superiores pridem statuit ob gravissima crimina nequatum tollerent, levioribus bocis ex delictis non perderetur.*

And

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And altho many of the schoolmen and cannonists are of opinion that death ought not to be inflicted for theft (*g*), yet the necessity of the peace and well ordering of the kingdom hath in all ages and almost all countries prevailed against that opinion, and annexed death as the punishment of theft, when the offense hath grown very common and accompanied with enormous circumstances, tho in some places more is left herein to the *Arbitrium Judicis* to give the same or a more gentle sentence according to the quality of the offense and offender, than is used in *England*, where the laws are more determinate, and leave as little as may be to the *Arbitrium Judicis*. See the case disputed learnedly by *Covarruvias Tomo 2. Lib. II. cap. 9. §. 7.*

This I have therefore mentioned, that it may appear, that capital punishments are variously appointed for several offenses in all kingdoms and states: and there is a necessity it should be so; for regularly the true, or at least, the principal end of punishments is to deter men from the breach of laws, so that they may not offend, and so not suffer at all; and the inflicting of punishments in most cases is more for example and to prevent evils, than to punish. When offenses grow enormous, frequent and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom and its inhabitants, severe punishments, even death itself, is necessary to be annexed to laws in many cases by the prudence of law-givers, tho possibly beyond the single demerit of the offence itself simply consider'd.

Penalties therefore regularly seem to be *juris positivi, & non naturalis*, as to their degrees and applications, and therefore in different ages and states have been set higher or lower according to the exigence of the state and wisdom of the law-giver. Only in the case of *murder* there seems to be a justice of retaliation, if not *ex lege naturali*, yet [14.] at least by a general divine law given to all mankind, *Gen. ix. 6.* And altho I do not deny but the supreme king of the world may remit the severity of the punishment, as he did to *Cain*, yea and his substitutes

(g) *Scotus Sentent. 4. distinct 154 quæst. 3. Sylvester in Verbo furtum 3.* Not only the schoolmen and cannonists were of this opinion, but by what has been above said, it appears likewise to have been the sense both of the *Judaïc* and *Romas* laws, and the, as our author says, the principal end of punishment is to deter men from offending, yet it will not follow from thence, that it is lawful to deter them at

any rate, and by any means; for even obedience to just laws may be enforced by unlawful methods. *Cic. Epist. 15. ad Brutum.* *Eft parsæ modus, scitæ rerum reliqua-*rum; and again, *Lib. I de officiis.* *Eft enim uicissendi & puniendi modus.* Besides, experience might teach us, that capital punishments do not always best answer that end. See *Grot. de juri bel. &c. Lib. II. cap. 20. §. 12. n. 3.*

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sovereign princes may also defer or remit that punishment, or make a commutation of it upon great and weighty circumstances, yet such instances ought to be very rare, and upon great occasions.

In other cases the *lex talionis* in point of punishments seems to be purely *juris positivi*; and altho among the *Jewish* laws we find it instituted *Exod. xxi. 24, 25* *Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe*; yet in as much as the party injur'd is living and capable of another satisfaction of his damage, (which he is not in case of murder) I have heard men greatly read in the *Jewish* lawyers and laws affirm, that these *taliones* among the *Jews* were converted into pecuniary rates and estimates to the party injured, so that in penal proceedings the rate or estimate of the loss of an eye, tooth, hand or foot was allowed to the person injur'd, *viz.* the price of an eye for an eye, and the price of an hand for an hand, &c. (h).

[*See 4 Blackf. Com. ch. i. Of the nature of crimes and punishments.*]

(h) *Maimonides More Nroochim, Part III. cap. 41.*

C H A P II.

Concerning the several incapacities of persons, and their exemptions from penalties by reason thereof.

MAN is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of

[15] the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions. But general notions or rules are too extravagant and undeterminate, and cannot

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cannot be safely in their latitude applied to all civil actions ; and therefore it hath been always the wisdom of states and law-givers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal laws in respect of their incapacity or defect of will.

Those incapacities or defects, that the laws, especially the laws of *England*, take notice of to this purpose, are of three kinds:

- I. Natural.
- II. Accidental.
- III. Civil incapacities or defects.

The natural is that of *Infancy*.

The accidental defects are,

1. *Dementia*.
2. *Casuality, or Chance*.
3. *Ignorance*.

The civil defects are.

1. *Civil Subjection*.
2. *Compulsion*.
3. *Necessity*.
4. *Fear*.

Ordinarily none of these do excuse those persons, that are under them, from civil actions to have a pecuniary recompense for injuries done, as *trespasses, batteries, woundings*; because such a recompense is [16] not by way of penalty, but a satisfaction for damage done to the party : but in cases of crimes and misdemeanors, where the proceedings against them is *ad pænam*, the law in some cases, and under certain temperaments takes notice of these defects, and in respect of them relaxeth or abateth the severity of their punishments.

{See 4. Blackf. Com. ch. ii.}

CHAP.

C H A P. III.

Touching the defect of infancy and nonage.

THE laws of *England* have no dependence upon the civil law, nor are governed by it, but are binding by their own authority; yet must it be confessed, the civil laws are very wise and well composed laws, and such as have been found out and settled by wise princes and law-givers, and obtain much in many other kingdoms so far as they are not altered, abrogated, or corrected by the special laws or customs of those kingdoms, and therefore may be of great use to be known, tho they are not to be made the rules of our *English* laws; and therefore tho I shall in some places of this book, and here particularly mention them, yet neither I, nor any else may lay any weigh or stress upon them, either for discovery or exposition of the laws of *England*, farther than by the customs of *England* or Acts of Parliament they are here admitted.

As to this business touching infancy, and how far they are capable of the guilt or punishment for crimes, I will consider, 1. What the civil laws tell us concerning the same. 2. What the common laws of *England* have ordained touching it, and wherein these agree, and wherein they differ touching this matter.

[17] The Civil law distinguishes the ages into several periods as to several purposes.

First, The complete full age as to matters of contract is according to their law twenty-five years (*a*), but according to the law of *England* twenty-one years (*b*).

Secondly, But yet before that age, *viz.* at seventeen years, a man is said to be of full age, to be a procurator (*c*), or an executor (*d*); and with that also our law agrees. 5 Co. Rep. Pigot's case (*e*).

Thirdly. As to matrimonial contracts, the full age of consent in males is fourteen years, and of females twelve (*f*); till that age

(*a*) *Institut.* Lib. I. tit. 23. *De Causis.* Dig. Lib. IV. tit. 4. *de Minoribus;* l. 1. &c.

(*b*) *Lit.* §. 104. Co. *Lit.* §. 103.

(*c*) *Institut.* Lib. I. tit. 6. *Quibus ex causis manusmittere non licet;* §. 5. & 7. Dig. Lib. III. tit. 1. *De Postulando;* b. i. §. 3. At this age it was the custom among the Romans to lay aside the habits of children, and put on the garments of men. *Vid*

Max. Lib. V. cap. 4. §. 4. *Sueton.* *August.* cap. 8.

(*d*) See *Swimb.* of Wills, par. V. §. 1. 2. 6.

(*e*) It is quoted in *Prince's case*, 5 Co. Rep. 29. b. *Office of Executors*, p. 307.

(*f*) *Institut.* Lib. I. tit. 10. *de nuptiis pr. Dig. Lib.* XXIII. tit. 2. *de rite nupiarum;* l. 4.

they

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they are said to be *impuberis* (*g*), and are not bound by matrimonial contracts; and with this also our law agrees (*h*).

Fourthly. As to matter of crimes and criminal punishments, especially that of death, they distinguish the ages into these four ranks.

1. *Ætas pubertatis plena.*
2. *Ætas pubertatis.*
3. *Ætas pubertati proxima.*
4. *Infantia.*

1. *Pubertas plena* is eighteen years (*i*).

2 *Pubertas* generally, in relation to crimes and punishments, [18] is the age of fourteen years and not before (*k*); and it seems as to this purpose there is no difference between the male and female sex; at this age they are supposed to be *doli capaces*, and therefore for crimes altho' capital, committed after this age they shall suffer as persons of full age (*l*); only by the constitutions of some kingdoms, in favour of their age, the ordinary punishments were not inflicted upon such young offenders; as in *Spain*, not unless he were of the age of seventeen years. *Vide Covar. de Matrimonio, cap. 5. §. 8. (m).* In *Selectione ad Clement. cap. Si Furiosus (n)*. By the antient law among the *Jews*, he that was but a day above thirteen years, was, as to criminals adjudged *in virili statu*, but not if under that age (*t*).

3. *Ætas pubertati proxima*, herein there is great difference among the *Roman* lawyers; and tho' they make a disparity herein between males and females, yet I think as to point of crimes the measure is the same for both: Some assign this *Ætas pubertati proxima* to ten

(*g*) *Institut. Lib. I. tit. 22. Quibus modis iusta finitur. pr. Dig. Lib. XXVIII. tit. 6. de unig. & pupil. subfinunt. l. 2. Macrob. Satyr. Lib. VII. cap. 7.*

(*b*) *Co. Lit. §. 104.* At the same age they were permitted by the civil law to make a Testament. *Digest. Lib. XXVIII. tit. 1. Qui testamenta facere possint, l. 5. Institut. Lib. II. tit. 12. Quibus non est permissione facere testamentum, §. 1. Cod. Lib. VI. tit. 22. Qui testamenta facere possint, vel. vel. l. 4.* The common law seems not to have determined precisely at what age one may make a testament of a personal estate, it is generally allowed that it may be made at the age of eighteen. *Office of Executors, p. 305. Co. Lit. §g. 6. and some say under, for the common law will not*

prohibit the spiritual court in such cases. *Sir Thos. Jones, Rep. 210. 1 Vern. 255. 2 Vern. 469.*

(*i*) *Dig. Lib. I. tit. 7. de adoptione. l. 40. §. 2. Instit. cod. tit. §. 4. Dig. Lib. XLII. tit. 1. de re judicat. l. 57. Lib. XXXIV. tit. 1. De alimentis. l. 14. §. 1.*

(*k*) *Dig. Lib. XXIX. tit. 5. de Senatus-consulato Silaniaco, &c. l. 1. §. 32.*

(*l*) *Dig. Lib. IV. tit. 4. de minoribus, l. 37. §. 1. Lib. XLVIII. tit. 5. ad leg. Jul. de adult. l. 36. Cod. Lib. 2. tit. 35. Si adulterio delictum. l. 1.*

(*m*) *Tom. I. p. 157.*

(*n*) *Par. III. §. 5. Tom. I. p. 558.*

(*t*) *Seld. de Syuedriis, Lib. II. cap. 13. §. 132.*

years

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years and an half; others to eleven years (*o*): If they be under the age which they call *Ætas pubertati proxima*, they are presumed *incapaces doli* (*p*), and therefore regularly not liable to a capital punishment for a capital offense: but this holds not always true; for according to the opinion of very learned civilians, before ten years and a half they may be *doli capaces*, and therefore it must be left *ad arbitrium judicis* upon the circumstances of the case; yet with this caution, *Judex, qui ante illam etatem arbitrari debet puerum esse proximum pubertati, maximis adducendus est conjecturis, & cautissime id agere, ac tandem raro. Covarr. ubi supra* (*q*). And with this agrees our law, as shall

[*19*] be shewed. But if the offender be in *ætate pubertati proximâ*, viz. according to some ten years and an half according to others eleven years old, he is more easily presumed to be *doli capax*, and therefore may suffer as another man, unless by great circumstances it appear, that he is *incapax doli*. But this hath also its temperaments, 1. By express provision of the constitution in *Codice de falsâ Monetâ*: “*Impuberis, si conscientia fuerint, nullum sustineant detrimenntum, quia ætas eorum, quid videat ignorat;*” but a penalty is laid upon the tutor (*r*).

2. Tho’ *ætas pubertati proxima* is regularly presumed *Capax dolî*, and so may be guilty of a capital offense.—*Digest. De regulis juris* (*s*). *Pupillum, qui proximus est pubertati, capacem esse futurandi*, yet as it is in *arbitrio judicis* to judge an infant within ten years and an half *capax dolî*, as before; so it is in *arbitrio judicis* upon consideration of circumstance to judge one above ten years and a half, nay of twelve, thirteen years, or but a day within fourteen years, to be *incapax dolî*, and so privileged from punishment, as appearing upon the circumstances of the fact not yet *constitutus in ætate proximâ pubertati*, or at least not *doli capax*; and with this our law doth in a great measure agree.

3. That if he be above ten years and a half, and appears *doli capax*, yet if under fourteen years, he is not to be punished *pænd ordinariâ*, but it may have some relaxation *ex arbitrio judicis* (*t*). But

(*o*) The prevailing opinion is, that the males are *puberets proximi* at ten and an half, and the females at nine and an half, because when they had passed the middle distance between infancy and puberty, they might then be properly said to be *ætatis pubertati proximi*.

(*p*) *Dig. Lib. XLVII. tit. 12. de fœpul- cibro violato, l. 3. §. 1.*

(*q*) *Tom. 1. p. 157.*

(*r*) *Lib. IX. tit. 24. §. 4.*

(*s*) *Lib. L. tit. 17. l. 411, Lib. XXIX. tit. 5. de Somnifacienti Silvano, l. 14. Lib. XLIV. tit. 4. de dol malo excepiente, l. 4. §. 26. Injus. Lib. IV. tit. 1. de obligatione qua ex delicto, §. 18. Dig. Lib. KLXIII. tit. 2. de fœtore, l. 23.*

(*t*) *Dig. Lib. IV. tit. 4. de minoribus, l. 37. §. In delicto.*

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altho our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offense in order to the King's pardon, yet it allows no arbitrary power to the judge to change the punishment that the law inflicts; and thus far for the third age or period, *Ætas pubertati proxima.*

4. The fourth age or period is *infantia*, which lasts till seven years; within this age there can be no guilt of a capital offense; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty (*a*); and if indicted for such an offense as is in its nature capital, he must be ac^d [20] quitted; and therefore the severity of the gloss upon the decretal *De delictis puerorum, cap. 1. (x)* is justly rejected in this case (*y*); and with this agrees the law of *England*.

But now let us consider the laws of *England* more particularly touching the privilege of infancy in relation to crimes and their punishments, and that in relation to two kinds of crimes, 1. Such as are not capital. 2. Such as are capital.

First, As to misdemeanors and offenses that are not capital: in some cases an infant is privileged by his non-age, and herein the privilege is all one, whether he be above the age of fourteen years or under, if he be under one and twenty years; but yet with these differences:

If an infant under the age of twenty-one years be indicted of any misdemeanor, as a *riot* or *battery*, he shall not be privileged barely by reason that he is under twenty-one years, but if he be convicted thereof by due trial, he shall be fined and imprisoned; and the reason is, because upon his trial the court *ex officio* ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged; and the same law is of a *feme covert*. 2. But if the offense charged by the indictment be a mere non-lease, (unless it be of such a thing as he is bound to by reason of tenure, or the like as to repair a bridge, &c.) (*z*) there in some cases he shall be privileged by his nonage, if under twenty-one, tho' above fourteen years, because *Laches* in such a case shall not be imputed to him (*a*).

(a) *Dix. Lib. XLVII. tit. 2. de furtis, l. 23.
Lib. XLVIII. tit. 8. ad leg. Cornel. de fico-
riis l. 12.*

(x) *Decretal. Lib. V. tit. 23.*

(y) *Tam. 1. p. 157.*

(a) *2 Co. Inf. 703.*

(a) *B. Saver default, 50. Cro. Jac.*

465, 466. Pl. Com. 364. a Co. Lit.

246. b.

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36 E. 3. *Affis.* 443. 4 H. 7. 11. b. If an infant in *Affise* vouch a record, and fail at the day, he shall not be imprisoned (*b*) nor it seems a *feme covert*. 13 *Affis.* 1. (*c*) and yet the statute of *Westmynst.* 2. cap. 25. that gives imprisonment in such a case, is general.

[21] 8 E. 2. *Corone* 395. If *A.* kills *B.* and *C.* & *D.* are present, and do not attach (*d*) the offender, they shall be fined or imprisoned; yet if *C.* were within the age of twenty-one years, he shall not be fined nor imprisoned.

3. Where the corporal punishment is but collateral, and not the direct intention of the proceedings against the infant for his misdemeanor, there, in many cases, the infant under the age of twenty-one shall be spared, tho' possibly the punishment be enacted by parliament. 14 *Aff.* 17. (*e*) If an infant of the age of eighteen be convict of a disseisin with force, yet he shall not be imprisoned. *Vide* 26 *Aff.* 9. 43 E. 3. *Imprisonment* 16. 40 E. 3. 44. a. (*f*) and yet a *feme covert* shall be imprisoned in such case. 16 *Aff.* 7.

If an infant be convict in an action of trespass *vi et armis*, the entry must be *nihil de fine, sed pardonatur, quia infans*; for if a *capiatur* be entred against him, it is error, for it appears judicially to the court, that he was within age when he appears by guardian. *P. 8. Jac. B. R. Holbrooke v. Dogley, Croke, n 3. (g)*; the like law is that he shall not be in *misericordia pro falso clamore* (*h*).

B. Coverture 68. General statutes that give corporal punishment are not to extend to infants, and therefore *Pl. Com.* 364, *a per Walsh*, if an infant be convict in ravishment of ward, he shall not be imprisoned, tho' the statute of *Merton* cap. 6. be general in that case (*i*): but this must be understood where it is, as before said, a punishment as it were collateral to the offense, as in the cases before-mentioned: but where a fact is made felony or treason, it extends as well to in-

(*b*) 2 *Co. Infis.* 414.

(*c*) *B. Covertu e 35. Rescis 87.*

(*d*) The words of the book are *ne lece le ne a d'attacb.*

(*e*) *F. Imprisonment* 8.

(*f*) "Et le cause est, pur ceo que la ley
" en'end', que un enfant ne poit my co-
" mustr' bien & mal' ne le quel soit ad-
" van age pour luy, ou nemy; ne nul foly
" sera adjuge en un enfant." *Mes.* 12. *M.*
4. 22. b. *Hank.* dit que enfant d'age de 18
ans poit estre disseisor ove-force & estre
emprison per cella.

(*g*) *Cro. Jac.* 274.

(*b*) *C. Lit.* 127. a. yet this was not a settled point, for 2. E. 3. 5, the court doubted of it; and in 17 E. 3. 75. b. and 41 *Affis.* 14. the plaintiffs, tho' infants were amerced *pro falso clamore*; but tho' they were amerced, yet it appears from the same cases that they were entitled on account of their infancy to a pardon of course. See 1 *R. A.* 214.

(*i*) Another like case is there put, if an infant be a receiver and account before auditors, and be found in arrears, the auditors cannot commit him to prison notwithstanding the general words of the statute of *W. 2. cap. 31.*

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fines, if above fourteen years (*k*), as to others, as shall be said. And this appears by several acts of parliament, and particularly by 1 Jac. cap. 11. of felony for marrying two wives, &c. where there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years; so that if the marriage were above the age of consent, tho' within the age of twenty-one years, it is not exempted from the penalty.

So by the statute of 21 H. 8. cap. 7. concerning felony by servants that imbezel their masters goods delivered to them, there is a special proviso, that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, viz. fourteen years, tho' under eighteen years, unless a special provision had been to exclude them (*l*).

I come therefore to consider the privilege of infancy in cases of capital offenses and punishments according to the laws of *England*, wherein I shall examine, 1 How the antient law stood. 2. How it stands at this day in relation to infants.

I. As to the antient law:

1. By what has been before said it appears that the Civil law was very uncertain in defining what was that *ætas pubertati proxima*, and consequently such as might subject the offender to capital guilt or punishment; some taking it to be ten years and an half, some eleven years, others more, others less. The laws of *England* therefore, that always affect certainty, determined antiently the *ætas pubertati proxima* to be twelve years for both sexes; under that age none could be regularly guilty of a capital offense, and above that age and under fourteen years, he might or might not be guilty according to the circumstances of the fact that might induce the court and jury to judge him *doli capax, vel incapax* (*m*).

This appears by the laws of king *Athelstan* mentioned in [23] the first chapter, “*Non parcatur alicui latroni super 12 annos & supra 12 d. quin occidatur.*” And altho’ his successor *Edmund* (*n*) reduced

(*k*) *Co. Lit.* 247. b.

(*l*) The like exception there is in the 12 Ann. cap. 7. where apprentices under the age of fifteen years, who shall rob their masters, are excepted out of the act.

(*m*) By the laws of *Ina*, l. 7, an infant of ten years of age might be guilty of being accessory to a theft, and was punished accordingly with servitude. *Wilk. Leg. Anglo-Sax.* p 16.

(*n*) This is a mistake, for it was not *Edmund* but king *Athelstan* himself, who thinking it a pitiable case that a youth but twelve years old should be put to death, as was permitted by the former law, changed the time from twelve years to fifteen, and ordered that none who was but fifteen years of age should be put to death, unless he resisted or fled; if he surrendered himself, he was only to be imprisoned until some of his relations or friends would

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(x) reduced it to fifteen years, unless he fled, yet it will appear that the standard of twelve years obtained in after ages (o).

2. It appears that an infant of twelve years was compellible to take the oath of allegiance in the leet, and under that age none were to take the oath, or to do suit to the leet. *Braet. Lib. III. (p). cap. 1.* (q) *Britton, cap. 29. in fine, Calvin's case, 7 Co. Rep. 6. b.* So that at that age, and not before, he was taken notice of by the law to be under the obligation of an oath, and consequently capable of discretion.

3. The ordinary process against capital offenders was and is by *Copies and Exigent*, and *Utral* thereupon; but against an infant under twelve, process of utrality in cases of indictment was not awardable, and if awarded, it was error; but if above that age, that process was awardable; and *Braet. Lib. III. (r) cap. 11. sect. 4 & 5.* gives the reason, " *Minor vero, qui infra etatem 12 annorum fuerit utlegari non debet, quia ante taalem etatem non est sub lege aliquâ nec in decenna;*" and *ibidem cap. 10. sect. 1.* he mentions an old law of king Edward (f), " *Omnis, qui etatis 12 annorum fuerit, facere debet sacra-*

[24] " *mentum in visu franciplegii, quod nec latro vult esse, nec latroni consentire;*" and *Stamf. Lib. I. cap. 19.* cites out of a book of *Braeton, De Visu Franci plegii*, " *Quod quilibet duodecim annorum post feloniam judicium sustinere,*" which implies also that within that age, regularly at least, he could not be a felon.

4. Again, *T. 32. E. 1. Rot. 32. Eboracum, coram rege. Adam filius Adæ de Arnalte captus noctanter in domo Johannis Somere coram rege ductus cognovit, quod furtive cepit, &c. 9s. per preceptum & missiōnem Richardi Short:* Richard Short had his clergy, " *Et*

would become security for him *iacens placitum copiis affirmationem, ut semper ad omni qualis affinat:* if he could not get any such security, then he was to take an oath to the same purpose in such manner as the bishop should direct him, and was to remain in servitio pro copiis sui affirmatione; but if after this he should be again guilty then he was to be put to death without any regard to his age. See *Will. leges Anglie Sex. p. 70.*

(o) In the time of king Henry I. the old law of king *Albiger* took place, *viz.* twelve years of age, and *8d.* value. *Ibid. p. 259.*

(p) *De Corona.*

(q) This seems to be a mistake, for *cap. 11 sect. 4.* for the oath mentioned in *cap. 1.* was to be taken by knights and others of the age of fifteen years and upwards.

(r) *De Corona.*

(f) There is no such law extant among those of king Edward, but the law here quoted is a law of *Caute*, *Leg. Caute, l. 19.* which is in these words, *Palmarus ut quilibet homo 12 annos status justicandum preficeret nulli furem esse neque furi confusuram,* which oath is to the same purpose with that mentioned by *Braeton, Lib. iii. de corona, cap. 1.* to be taken at the age of fifteen; and tho there be a difference as to the age, yet probably it is the same oath, for it is very easy and natural to mistake xiii for xv. See the Statute of *Marlbridge, cap. 10 & 15.* and lord Coke's comment thereon, 2 *Infl. 147.* where he takes notice that the old books are misprinted. See also 2 *Infl. 71.* *Mirror, cap. 1. § 3.* *Britton, cap. 12.*

" predictus

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" predictus Adam commissus fuit custodiae mariscalli custodiend⁹; quia
" infra etatem; postea habito respectu ad imprisonamentum, quod pra-
" dictus Adam habuit, & etiam ad teneram etatem ejusdem Adæ, eo
" quod non est nisi etatis 12 annorum, qui talis etatis judicium ferre
" non potest, ideo de gratiâ regis deliberetur, &c." Upon this record
these things are observable, viz. 1. The court recorded his confession; but regularly that ought not to be, for if an infant under the
age of twenty-one shall confess an indictment, the court in justice
ought not to record the confession, but put him to plead *not guilty*, or
at least ought also to have enquired by an inquest of office of the
truth and circumstances of the fact. 2. That here he was twelve
years old, and yet judgment spared, and the reason given, *Qui talis*
etatis judicium ferre non potest. Yet 3. There is somewhat still of
gratia regis interposed, as it seems, in respect he was past the old
standard of twelve years.

II. But now let us come to the Common law as it stood in after-times; for in process of time, especially in and after the reign of king Edward III. the Common law received a greater perfection, not by the change of the Common law, as some have thought, for that could not be but by act of parliament; but men grew to greater learning, judgment and experience, and rectified the mistakes of former ages and judgments, and the law in relation to infants and [25] their punishments for capital offenses was and to this day is as followeth.

1. It is clear that an infant above fourteen and under twenty-one is equally subject to capital punishments, as well as others of full age; for it is *presumptio juris*, that after fourteen years they are *doli capaces*, and can discern between good and evil; and if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion. Experience makes us know that every day murders, bloodsheds, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority, no man's life or estate could be safe (*t*). In my remembrance at Thetford a young

(*t*) Our author's argument concludes very strongly against their escaping with impunity, but loses much of its force when argued in behalf of *capital* punishments, for there is no necessity that if they be not capitally punished they must therefore go unpunished; so that whatever severity may

be needful in cases of marden and acts of violence, yet in the common instances of larceny and stealing, some other punishment might be found, which might leave room for the reformation of young offenders.

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lad of sixteen years old was convict for successive wilful burning of three dwelling houses, and in the last of them burning a child to death, and yet had carried the matter so subtilly, that by a false accusation of another person for burning the first house an innocent person was brought in danger, if it had not been strangely discovered: he had judgment to die, and was accordingly executed (*u*).

Fourteen years of age therefore is the common standard, at which age both males and females are by the law obnoxious to capital punishments for offenses committed by them at any time after that age; and with this agrees *Fitz. N. B.* 202. *b.* (*x*) *Co. Litt.* §. 405 (*y*). *Vide Mr. Dalton's Justice of Peace, cap. 95.* and 104 (*z*).

[26] 2. An infant under the age of fourteen years and above the age of twelve years is not *prima facie* presumed to be *doli capax*, and therefore regularly for a capital offense committed under fourteen years he is not to be convicted or have judgment as a felon, but may be found not guilty.

But tho *prima facie* and in common presumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil at the time of the offense committed, he may be convicted and undergo judgment and execution of death, tho he hath not attained *annum pubertatis*, *viz.* fourteen years; tho according to the nature of the offense and circumstances of the case the judge may or may not in discretion reprieve him before or after judgment, in order to the obtaining the king's pardon. 12 *Aff.* 30. *Corone* 118 & 170. *Alice de Waldborough* of the age of thirteen years was burnt by judgment for killing her mistress; and it is there said, that by the antient law none shall be hanged within age which is intended the age of discretion, *viz.* fourteen years; but before *Spigurnel* an infant within age (*a*) that had kild his companion, and hid himself (*se mucha*) was presently hanged; for it appeared by his *muching* he could discern between good and evil, and *malitia supplet etatem*.

25 E. 3. 85. *Corone* 129. One within age was found guilty of larceny, and by reason of his nonage judgment was respite, but

(*u*) At *Abingdon assizes*, Feb. 23, 1629, before *Whitelocke* justice, one *John Dean*, an infant, between eight and nine years, was indicted, arraigned, and found guilty of burning two barns in the town of *Windsor*; and it appearing upon examination that he had malice, revenge, craft, and cunning,

he had judgment to be hanged, and was hanged accordingly. *MS. Report.*

(*x*) *N. Fedit.* p. 450.

(*y*) p. 247. *b.*

(*z*) The first edition, but in the last edition, *cap. 147* and 157.

(*a*) Ten years old, according to *Fitzherbert's Report Corone* 118.

afterwards

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Afterwards he was brought to the bar and had his judgment; tho this book be generally *one within age*, it must be intended within the age of discretion, *viz.* fourteen years, for it was never made a doubt, whether if above that age he might not have judgment.

3. But yet farther, if an infant be above seven years old, and under twelve years, (which according to the ancient law was *Etas pubertati proxima*) and commit a felony, in this case *prima facie* he is to be judged not guilty, and to be found so, because he is supposed not of discretion to judge between good and evil (*b*); yet even in that case if it appear by strong and pregnant evidence and circumstances, [27] that he had discretion to judge between good and evil, judgment of death may be given against him. 3 H. 7. 1. b. & 12. b. An infant of the age of nine years kill'd an infant of the like age; he confessed the felony, and upon examination it was found he hid the blood and the body; the justices held he ought to be hanged (*c*).

But in cases of this nature, 1. It is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did; for if the law require such an evidence where the offender is above twelve, and under fourteen, much more if he were under twelve at the time of the fact committed. 2. The circumstances must be inquired of by the jury, and the infant is not to be convict upon his confession. 3. It is prudence in such a case even after conviction to respite judgment, or at least execution (*d*); but yet I do not see how the judge can discharge him if he be convict, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known.

And therefore the book of 35 H. 6. 11. & 12. *per Moyle & Billing*, “*That tho a jury should find such an infant guilty, the court ex officio must discharge him;*” must be understood either first only of a reprieve before judgment, or secondly at least, that the jury find the fact, and that he was either within the age of infancy, *viz.* seven years old, or that he did the fact, but was under fourteen, and not of discretion to judge between good and evil; in which case the court *ex officio* ought to discharge him, because it is not felony.

(*b*) *B. Coronæ* 153.

(*c*) But however they respite the execution that he might get a pardon. *F. Coronæ* 57. *B. Coronæ* 133. *Dalton* says that

an infant of eight years of age may commit homicide, and shall be hanged for it.

See *Dalton's Justice*, cap. 147.

(*d*) *Dalton's Justice*, p. 505.

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4. And lastly, If an infant within age be *infra etatem infans*, viz. seven years old, he cannot be guilty of felony (e), whatever

[28] circumstances proving discretion may appear; for *ex presumptione juris* he cannot have discretion (f), and no averment shall be received against that presumption: and altho the laws of *England*, as well as the Civil and Canon law, assign a difference between males and females as to their age of consent to marriage, viz. fourteen to the male, twelve to the female; yet it seems to me, that as to matters of crimes, especially in relation to capital punishments, the females have the same privilege of nonage as the males; and therefore the regular *Ætas pubertatis* in reference to capital crimes and punishments of both is fourteen years, with those various temperaments and exceptions above assigned.

And it is to be observed, that in all cases of infancy, insanity, &c. if a person uncapable to commit a felony be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find him generally *not guilty*, or they may find the matter specially, that he committed the fact, but that he was *non compos*, or that he was under the age of fourteen, *scilicet etatis 13 annorum*, and had not discretion to discern between good and evil, & *non per feloniam*; and thereupon the court gives judgment of acquittal. 21 H. 7. 31. (g). But if a man be arraigned in such a case upon an indictment of murder or manslaughter by the coroner's inquest, there if the party committed the fact, regularly the matter ought to be specially found, because if the jury find the party *not guilty*, they must inquire how he came by his death, viz. "Et juratores praedicti quæsiti per curiam, quomodo is ad mortem suam devenit, dicunt super sacramentum suum, quod praeditus A. B. die — anno — apud D. dum non fuit compos mentis, or dum fuit *infra etatem discretionis*, scilicet 9 annorum, nec scivit discernere inter bonum & malum, praedictum J. S. cum gladio, &c. percussit & ipsum ad tunc & ibidem occidit, sed non ex malitia preconitatâ, neque per feloniam, vel felleo animo; & sic idem J. S. ad mortem suam devenit." But if he be first arraigned,

[29] and acquitted upon the indictment by the grand inquest, and found not guilty, he may plead that acquittal upon his arraignment upon the coroner's inquest, and that will discharge

(e) And yet there is a precedent in the register, fol. 399. b. of a pardon granted to an infant within the age of seven years, who was indicted for homicide: in this

case the Jury found, that he did the fact before he was seven years old.

(f) Plac. 19. a.

(g) B. Corone 61.

him; and the petit jury shall inquire farther how the party came by his death.

[4. Blakf. Com. ch. ii. page 22.]

CHAP IV.

Concerning the defect of ideocy, madness and lunacy, in reference to criminal offenses and punishments.

AND thus far touching that natural defect of *infancy*. Now concerning another sort of defect or incapacity, namely *ideocy, madness and lunacy*; For tho by the law of *England* no man shall avoid his own act by reason of these defects (*a*), tho his heir or executor may, yet as to capital offenses these have in some cases the advantage of this defect or incapacity (*b*); and this defect comes under the general name of *Dementia*, which is thus distinguished.

I. *Idocy, or fatuity à nativitate vel dementia naturalis*; such a one is described by *Fitzherbert*, who knows not to tell 20s. nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the instruction of another, then he is no ideot. *F. N. B.* 233. *b.* These, tho they may be evidences yet they are too narrow, and conclude not always; for *ideocy or not* is a question of fact triable by jury, and sometimes by inspection.

II. *Dementia accidentalis, vel adventitia*, which proceeds from several causes; sometimes from the distemper of the humours of the body, as deep melancholy or adust choler; sometimes from the violence of a disease, as a fever or palsey; sometimes from a concussion or hurt of the brain, or its membranes or organs; and as it comes from several causes, so it is of several kinds or degrees; which as to the purpose in hand may be thus distributed:

1. There is a partial insanity of mind; and 2. a total insanity.

The former is either in respect to things *quoad hoc vel illud insarcere*; some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in

(*a*) For it is said to be a maxim in law, that no man of full age shall be permitted to stultify himself. *4 Co. Rep.* 123. *b.* *Beverly's case, Co. Lit.* 247. *a.* The reason hereof is, because a man cannot know or remember what acts he did when he was of non *sane memory*. *35 Affi.* pl. 10. See *contra F. N. B.* p. 449. *Slew. Co. Parl.* 153. 2 *Salk.* 576.

(*b*) *Co. Lit.* 247. *b.* *Płowd.* 19. *a.*

respect

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respect of degrees ; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason ; and this partial insanity seems not to excuse them in the committing of any offense for its matter capital ; for doubtless most persons that are felons of themselves, and others are under a degree of partial insanity, when they commit these offenses : it is very difficult to define the indivisible line that divides perfect and partial insanity ; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes : the best measure that I can think of is this ; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.

Again, a total alienation of the mind, or perfect madness ; this excuseth from the guilt of felony and treason (*d*) ; *de quibus infra.* This is that, which in my lord Coke's *Pleas of the Crown*, p. 6. is call'd by him absolute madness, and total deprivation of memory.

[31] Again, this accidental *dementia*, whether total or partial, is distinguished into that which is permanent or fixed, and that which is interpolated, and by certain periods and vicissitudes : the former is *phrenesis* or madness ; the latter is that, which is usually call'd *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of *dementia* ; such persons commonly in the full and change of the moon, especially about the Equinoxes and summer solstice, are usually in the height of their distemper ; and therefore crimes committed by them in such their distempers are under the same judgment as those whereof we have before spoken, namely, according to the measure or degree of their distemper ; the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission. But such persons as have their lucid intervals, (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no such deficiency (*e*) ; nay, the

(*d*) 23 H. 7. 31. b.

(*e*) F. Corone 324.

alienations

alienations and contracts made by them in such intervals are obliging to their heirs and executors (*f*).

Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly call'd *furor*, *rabies*, *mania*, which commonly ariseth from adust choler, or the violent inflammation of the blood and spirits, which doth not only take away the use of reason, but also superadds to the unhappy state of the patient rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as is a deep *delirium*, *slupor*, memory quite lost, the phantasy quite broken, or extremely disordered. And as to criminals these *dementes* are both in the same rank; if they are totally depriv'd of the use of reason, they cannot be guilty ordinarily of capital offenses, for they have not the use of understanding, and are not as reasonable creatures, but their actions are in effect [32] in the condition of brutes (*g*).

III. The third sort of *dementia* is that, which is *dementia affectata*, namely *drunkenness*. This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some Civilians (*h*), such a person committing *homicide* shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness, than the crime committed in it: but by the laws of England such a person (*i*) shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses. *Plowd.* 19. *a. Crompt. Just.* 29. *a.*

But yet there seems to be two allays to be allow'd in this case.

1. That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.

2. That altho' the *simplex* phrenzy occasion'd immediately by drunkenness excuse not in criminals, yet if by one or more such practices, an *habitual* or fixed phrenzy be caus'd, tho' this madness was

(*f*) 4 Co. 125. *a.*

varruvias, Tom. I. p. 557. in select. ad

(*g*) Bras. 420. b. F. Corone 193, 351.

Clem. Si furiosut. Par. iii. §. 3. & 4.

(*b*) *Barbolianus* and others. See Co-

(*i*) 4 Co. 125. *a.*

contracted

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contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caus'd puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.

Now touching the trial of this incapacity, and who shall be adjudged in such a degree thereof to excuse from the guilt of capital offenses, this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of the degrees of this infirmity, whereof some [33] are sufficient, and some are insufficient to excuse persons in capital offenses.

Yet the law of *England* hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *vivæ voce* in the presence of the judge and jury, and by the inspection and direction of the judge.

There are two sorts of trials of ideocy, madness, or lunacy; the first, in order to the commitment or custody of the person and his estate, which belongs to the king, either to his own use and benefit, as in case of *ideocy*; or to the use of the party, in case of accidental madness or *lunacy*; and in order hereunto there issues a writ (*k*) or commission to the sheriff or escheator, or particular commissioners, both by their own inspection and by inquisition to inquire, and return their inquisition into the Chancery; and thereupon a grant or commitment of the party and his estate ensues; and in case the party or his friends find themselves injured by the finding him a lunatick or ideot, a special writ may issue to bring the party before the chancellor, or before the king to be inspected. *Vide Fitz. N. B. 233 (l)*.

But this concerns not the purpose in hand; for whether the party that is supposed to commit a capital offense be thus found an ideot, madman or lunatick, or not, yet if really he be such, he shall have the privilege of his ideocy, lunacy, or madness, to excuse him in capitals.

Secondly therefore, the trial of the incapacity of a party indicted or appealed of a capital offense is, upon his plea of *not guilty*, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree, as may excuse him from the guilt of a capital offense (*m*).

(*k*) See *Stat. Procl. 33. 6.* (*l*) *N. Edw. 517.* (*m*) *Savil. 50. 1. Assd. 109.*

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In presumption of law every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil as criminal.

Again, if a man be a lunatick, and hath his *lucida intermissiones*, and this be sufficiently proved, yet the law presumes [34] the acts or offenses of such a person to be committed in those intervals, wherein he hath the use of reason, unless by circumstances or evidences it appears they were committed in the time of his delirium; and this also holds in civils as well as in criminals.

And altho in civil cases, he that goes about to allege an act done in the time of lunacy, must strictly prove it so done, yet in criminal cases (where the court is to be thus far of counsel with the prisoner, as to assist him in matters of law and the true stating of the fact) if a lunatick be indicted of a capital crime, and this appears to the court, the witnesses to prove the fact may and must also be examined, whether the prisoner were under actual lunacy at the time of the offense committed.

A man that is *furdus & mutus a nativitate*, is in presumption of law an ideot, and the rather, because he hath no possibility to understand what is forbidden by law to be done, or under what penalties [n]: but if it can appear, that he hath the use of understanding, which many of that condition discover by signs to a very great measure, then he may be tried, and suffer judgment and execution, tho' great caution is to be used therein (o).

I come now to apply what has been said to the various natures of capital crimes.

If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment; and this holds as well in cases of treason, as felony, even tho' the delinquent in his sound mind were examined, and confessed the offense before his arraignment: and this appears by the statute of 33 H. 8. cap. 20.

(n) *Vide Leg. Alfredi, l. 14. B. Corone 201 & 217.*

(o) According to 43 Affl. pl. 30. and 2 H. 4. s. if a prisoner stands mute, it shall be inquired, whether it be wilful or by the act of God; from whence Crompton avers, that if it be by the act of God he

shall not suffer. *Crompt. Trub. 29. a.* But if one who is both deaf and dumb, may discover by signs that he hath the use of understanding, much more may one, who is only dumb, and consequently may be guilty of felony, *sed quare*, how he shall be arraigned.

which

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which enacted a trial in case of treason after examination in the absence of the party ; but this statute stands repeal'd by the statute of 1 & 2 Phil. & Mar. cap. 10. Co. P. C. p. 6. And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried ; or, if after his trial he becomes of *non sane memory* he shall not receive judgment ; or, if after judgment he becomes of *non sane memory*, his execution shall be spared ; for were he of sound memory, he might allege somewhat in stay of judgment or execution. Co. P. C. 4 (p).

But because there may be great fraud in this matter, yet if the crime be notorious, as *treason* or *murder*, the judge before such respite of trial or judgment may do well to impanel a jury to enquire *ex officio* touching such insanity, and whether it be real or counterfeit.

If a person of *non sane memory* commit *homicide* during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the King's grace to pardon him. 26 Aff. 27. 3 E. 3. Corone 351.

But it seems in such a case it is prudence to swear an inquest *ex officio*, to enquire touching his madness, whether it was feign'd ; and thus it was done in the case of 3 E. 3. and in Somervil's case, Anderson's Rep. par. 1. n. 154. But in case a man in a phrenzy happens by some oversight, or by means of the gaoler to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial, that he is mad, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vita* ; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit it should be pro-

[36] ceeded in the trial, in order to his acquittal and enlargement.

If a person during his insanity commit *homicide* or *petit treason*, and recover his understanding, and being indicted and arraigned for the same, pleads *not guilty*, he ought to be acquitted ; for by reason of his incapacity he cannot act *felleo animo*. 12 H. 3. Dower 183. Forfeiture 33. 21. H. 7. 31. b. *il alera quite*, that is, shall be found not guilty.

(p) See Sir John Hawley's Remarks on Batman's trial. State Trials, Vol. 4. p. 205.
And

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And it is all one, whether the phrenzy be fix'd and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party was under that distemper.

In the year 1668, at *Aylesbury*, a married woman of good reputation being deliver'd of a child, and having not slept many nights fell into a temporary phrenzy, and kill'd her infant in the absence of any company; but, company coming in, she told them she had kill'd her infant, and there it lay; she was brought to gaol presently, and after some sleep she recovered her understanding, but marvelled how or why she came thither; she was indicted for murder, and upon her trial the whole matter appearing, it was left to the jury with this direction, that if it did appear, that she had any use of reason when she did it, they were to find her guilty; but if they found her under a phrenzy, tho' by reason of her late delivery and want of sleep, they should acquit her; that had there been any occasion to move her to this fact, as to hide her shame, which is ordinarily the case with such as are delivered of bastard children and destroy them; or if there had been jealousy in her husband, that the child had been none of his; or if she had hid the infant, or denied the fact, these had been evidences that the phrenzy was counterfeit; but none of these appearing, and the honesty and virtuous deportment of the woman in her health being known to the jury, and many circumstances of insanity appearing the jury found her not guilty, to the satisfaction of all that heard it.

Touching the great crime of *treason* regularly the same is to be said, as in case of *homicide*, such a phrenzy or insanity as excuseth from the guilt of the one, excuseth from the guilt of the other: the reason is the same; he that cannot act *felonice* or *animo felonico* cannot act *proditorie*, for being under a full alienation of mind, he acts not *per electionem* or *intentionem*. This appears by the [37] Statute of 33 H. 8. cap. 20. which, tho' it enact, that a *non compos mentis* shall be tried for treason, yet it expressly declarereth, "That if any commit high treason, while they are in good, whole, and perfect memory, and after examination become *non compos mentis*, and that it be certified by four of the council, that at the time of the treason they were of good, sound, and perfect memory, and then not mad, nor lunatic, and afterwards became mad; then they shall proceed to trial;" which strongly enforceth, that a treason cannot be committed by a madman, or lunatic, during his lunacy.

And

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And with this agrees my lord Coke, *P. C.* p. 6. in these words, *He that is non compos mentis, and totally deprived of all compassings and imaginations, cannot commit high treason by compassing or imagining the death of the king; for furiosus solo furore puniter; but it must be an absolute madness, and a total deprivation of memory.*

This, tho it be general, yet the same author tells us, 4 *Rep.* 124. b. *Beverly's case*, in these words, *Mes in aucun casos non compos mentis poit committe hault treason, come si il tua, ou offrir a tuer le roy.* This is a safe exception, and I shall not question it, because it tends so much to the safety of the king's person: but yet the same author, *P. C.* p. 6. tells us, that tho this was anciently thought to be law, yet it is not so now; for such a person as cannot compass the death of the king by reason of his infancy, cannot be guilty of treason within the statute of 25 *E. 3.* And thus far concerning the incapacity of ideocy, madness, and infancy.

[4. Blackf. Com.ch. ii. p. 25.]

CHAP. V.

Concerning casualty and misfortune, how far it excuseth in criminals.

[38] I COME to the second kind of accidental defects, viz. *casualty* and *misfortune*, and to consider how far it excuseth: and first we are to observe in this, and likewise in some other of the defects before and hereafter mentioned, a difference between civil suits, that are terminated *in compensationem damni illati*, and criminal suits or prosecutions, that are *in vindicacione criminis committi*.

If a man be shooting in the fields at rovers, and his arrow hurts a person standing near the mark, the party hurt shall have his action of trespass, and recover his damages, tho the hurt were casual (*a*); for the party is damnified by him, and the damages are but his reparation; but if the party had been kill'd, it had been *per infortunium*, and the archer should not suffer death for it, tho yet he goes not

(a) *Hob.* 134.)

altogether

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not altogether free from all punishment (*b*) 6 E. 4. 7. *per Cate-*
þy (*c*).

As to criminal proceedings, if the act, that is committed be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of *England* to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offense capital.

Now, what shall be said thus simply casual, and what the [39] punishment, will be at large consider'd, when we come to homicide *per infortunium*; only something will be necessary to be said thereof here.

If a man do *ex intentione* and voluntarily an unlawful act tending to bodily hurt of any person, as by striking or beating him, tho he did not intend to kill him, but the death of the party struck doth follow thereby within the year and day (*d*); or if he strike at one, and missing him kills another, whom he did not intend, this is felony (*e*) and homicide, and not casualty or *per infortunium*.

So it is if he be doing an unlawful act, tho not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide, and not *per infortunium* (*f*); for the act was voluntary, tho the event not intended; and therefore the act itself being unlawful, he is criminally guilty of the consequence, that follows:

But if a man be doing a lawful act without intention of any bodily harm to any person, and the death of any person thereby ensues, as if he be cleaving wood, and the axe flies from the helve, and kills another, this indeed is manslaughter, but *per infortunium*; and the party is not to suffer death, but is to be pardoned of course; for it

(*a*) *Hob.* 134.

(*b*) For he forfeits all his goods and chattels. 2 H. 3. 18. *F. Corone.* 302. 2 Co. *Inf.* 149. 3 Co. *Infit.* 220. By the ancient law he was liable to make the same recompence or *wergild*, as in any other case of homicide; e. g. if one shooting at a mark should accidentally wound and kill another, he was nevertheless to pay his *wergild*. *Leg. H. 1.* 88. 1. 90. *Legis causa et placitus, qui insciem̄ peccat, scim̄ dicitur emendet*; but by the same law, if one, who was standing on a tree or any other place, where he was at work, should chance to fall on another passing by, he was not to pay any thing, but was deem'd

intirely innocent. See *Wilk. Leg. Anglo-Sax.* p. 277, 279.

(*c*) *B. Corone* 148. *Trespass* 310. *F. Corone* 354.

(*d*) The reason of this is, because the law doth presume, that after the year and day it cannot then be discerned, whether he died of the stroke, or a natural death. 3 Co. *Infit.* 63.

(*e*) The like in the case of malhem, if a man strike at one, and missing him malhem another, 13 H. 7. 14. a.

(*f*) 11 H. 7. 23. a. *per Fineux Ch. Justis* *B. Corone* 229. *Proclamation* 13. 22. *Affit pl. 71.*

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appears by the statute of *Marlbridge*, cap. 26. that it was not done [40] *per felonum* (g) : yet the laws of *England* are so tender of the life of man, and to make men very cautious in all their actions that the party, tho his life be spared, yet forfeits his goods, and must expect the king's grace to restore them.

There happen'd this case at *Peterborough*: Deer broke into the corn of A. and spoiled it in the night-time ; A. sets his servant to watch in the night with a charged gun at the corner of the field, commanding him, that, when he heard any thing rush into the standing corn, he should shoot at that place, for it was the deer: the master was in another corner of the field, rushed into the standing corn ; the servant according to his master's direction shot, and killed his master ; it was agreed on all hands, this was neither petit treason, nor murder, but whether it were simple homicide, or *per infortunium*, was a great difficulty : First, the shooting was lawful, when the deer came into the corn, it being no *purlieu*, nor proclaimed, or chaced deer ; again, the error of the servant was caused by the master's direction, and his own act ; but if it had been a stranger that had been killed it had been homicide, and not misadventure ; on the other side, the servant was to have taken more care, and not to have shot upon such a token as might have befallen a man as well as a deer ; and therefore for the omission of due diligence, and better inspection, before he adventured to shoot, it might amount to manslaughter, and so be capital ; and this seems to be the truer opinion.

But in the case of Sir *William Hawkworth*, related by *Baker* in his chronicle of the time of *Edward IV.* p. 223 (h) he being weary of his life, and willing to be rid of it by another's hand, blamed his parker for suffering his deer to be destroyed, and commanded him, that he should shoot the next man that he met in his park, that would not stand or speak ; the knight himself came in the night into the park, and being met by the keeper refused to stand or speak ; the

(g) Here our author rightly says it appears by the statute of *Marlbridge*, that it was not felony, for that statute only supposes it not to be felony, but does not make that not to be felony which was so before, as some have imagined. 2 Co. *Instit.* 148, 315. for it appears by *Magna Charta* cap. 26. which was before the statute of *Marlbridge*, that he who kill'd another *per infortunium*, was in no danger of death. *Kel.* 123. nor indeed could it be felony, it not being done *falto animo*, 4 Co. 124 b. The design of that statute was quite

of another nature, viz. that the country should not be amerced where a man was kill'd *per infortunium*, for at that time *murdrium* peculiarly signified the secret private killing of a man ; as if he was found kill'd, but it was not known by whom ; and thus it is defined by *Bracton*, Lib. III. de *corona*, cap. 1. to be *occulta occisio*; and in the laws of *Henry I.* l. 92. *murdritus homo dicebatur, cuius interfectus neficiabatur* ; and in *Dialogo de Scaccario*, Lib. I. cap. 10. 10. *murdrium idem est, quod absconditum*.

(h) Sub anno 1471.

keeper

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keeper shot and killed him, not knowing him to be his master ; this seems to be no felony, but excuseable by the statute of *Malefactores in parcis* (*i*) for the keeper was in no fault, but his master ; but, [41]
had he known him, it had been murder.

As to matter of high treason, where the life of the king is concern'd, it is not safe too easily to admit an excuse by chance or misfortune ; tho such fact cannot be treason, that was purely casual and involuntary, for there must be a *compassing or imagining* to make treason ; yet a treasonable intention may be disguis'd under the colour of chance, and the safety of the king's life is of highest concernment.

And therefore when *Walter Tyrrel*, with a glance of an arrow from a tree involuntarily, as *Matthew Paris* (*k*) tells us, kill'd *William Rufus*, it could not be treason, (*l*) because there was no purpose of any mischief, and he shot at the deer by the king's command ; yet the fact was of such a consequence, that he fled for it, which was a circumstance that might probably infer, that there was some ill-intention, which might make him guilty of treason, and not barely accident. *Co. P. C. p. 6.*

History tells us, that upon a solemn just, or tournament appointed by *Henry II.* king of *France*, upon the marriage of his daughter, the king himself would needs run, and commanded the earl of *Montgomery* to run against him ; the earl's lance breaking upon the king's cuirasse, a splinter flew into the king's eye, and hit it, whereof he died : this was not treason, because purely accidental.

[See Foster. Discourse the 2d, ch. i. page 258, &c.]

C H A P. VI.

[42]

Concerning ignorance, and how far it prevails, to excuse in capital crimes.

IGNORANCE of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from the penalty of the

(*i*) This statute was made the 21 E. I. and doth expressly enact, " That if any parke find a trespasser wandering within his liberty, intending to do damage therein, and upon cry made to him to stand he will not yield, but fleeth or defendeth himself with force; if such par-

" ker kill such offender in endeavouring to take him, he shall not be arraigned for the same, nor suffer any punishment." S. P. C. 13. b.

(*k*) p. 54.

(*l*) *Gestum de Normand. cap. 14.*

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breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do: *Ignorantia verum, quo quis scire tenetur, non excusat* (*a*).

But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary; and indeed many of the cases of misfortune and casualty mention'd in the former chapter are instances that fall in with this of ignorance: I shall add but one or two more.

It is known in war, that it is the greatest offense for a soldier to kill, or so much as to assault his general: suppose then the inferior officer sets his watch, or sentinels, and the general to try the vigilance or courage of his sentinels comes upon them in the night in the posture of an enemy, (as some commanders have too rashly done) the sentinel strikes, or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offense.

In the case of *Levet* indicted for the death of *Frances Freeman*, the case was, that *William Levet* being in bed and asleep in the night, his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the servant going to let out *Frances* thought she heard thieves breaking open the door; she therefore ran up speedily to her master, and informed him, that she thought thieves were breaking open the door; the master rising suddenly, and

[43] taking a rapier, ran down suddenly; *Frances* hid herself in the buttery; lest she should be discovered; *Levet's* wife spying *Frances* in the buttery, cried out to her husband, "Here they be, that would undo us." *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died. This was resolved to be neither murder, nor manslaughter, nor felony. Vide this case cited by justice *Jones*, *P. 15 Car. 1. B. R. Cro. Car. 538. Cook's case.*

[Forster 292.]

(a) *Plowd. 343. a.*

CHAP.

C H A P. VII.

Touching incapacities, or excuses by reason of civil subjection.

I COME now to those incapacities, which I have styled civil, and to consider how far they indemnify and excuse in criminals, and criminal punishments.

And first concerning that, which ariseth by reason of civil subjection.

And this civil subjection is principally of the subject to his prince, the servant to his master, the child to his parent, and the wife to her husband. Somewhat I shall say of each of these.

I. As to the *first* of these subjections, the *subject* to his *prince*; it is regularly true, that the law presumes, the king will do no wrong; neither indeed can do any wrong (*a*); and therefore, if the king command an unlawful act to be done, the offense of the instrument is not thereby indemnified (*b*); for though the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law. *Vide Stamf. P. C. 102. b. (c)*; yet in the time of peace, if two men combat together at barriers, or for trial of skill, if one kill the other it is homicide; but if it be by the command of the king, it is said (*d*) it is no felony. 11 H. 7. 23. *a*.

II. As touching the civil subjection of the *child*, or *servant*; if either of them commit an act, which in itself is treason, or felony, it is neither excused nor extenuated as to the point of punishment by the command of his master, or parent; for the command is void and against law, and doth not protect either the commander or the instrument, that executes it by such command (*e*).

(*a*) *Co. Lit. 19. b. 4.*

(*b*) As if one man arrest another merely by the king's commandment, that shall be no excuse to him, but he is nevertheless liable to an action of false imprisonment. 16 H. 6. *F. Monstreum de faits* 182. 1 H. 7. 4. *B. Prerogative* 129.

(*c*) *Vide Bracton Lib. III. De actionibus, cap. 9.*

(*d*) *Per Finch Ch. Just. but Bracte in his abridgement of this case, Corone 229, says, that other justices in the time of Henry VIII. denied this opinion of Finch, and held, that it was felony to kill a man in jousting and the like, notwithstanding the commandment of the king; for that the commandment is against law. 3 Co. Inst. 56, 160.*

(*e*) *Dalt. Just. Cap. 157. N. Edit.*

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III. As to the civil subjection of the *wife* to the *husband*: tho in *many* cases the command, or authority of the husband, either express or implied, doth not privilege the wife from capital punishment for capital offenses; yet in *some* cases the indulgence of the law doth privilege her from capital punishment for such offenses, as are in themselves of a capital nature; wherein these ensuing differences are observable.

1. If a *feme covert* alone without her husband, and without the coercion of her husband, commit treason or felony, tho it be but larceny, she shall suffer the like judgment and execution, as if she were *sole*; this is agreed on all hands. *Stampf. P. C. Lib. I. cap. 19, 15 E. 2. Corone 383.*

[45] 2. But if she commit larceny by the coercion of the husband, she is not guilty. *27 Aff. 40. (f)*; and according to some, if it be by the command of her husband. *Ibid. (g)* which seems to be law, if her husband be present (*h*); but not if her husband be absent at the time and place of the felony committed.

3. But this command or coercion of the husband doth not excuse in case of treason, nor of murder, in regard of the heinousness of those crimes. *Mr. Dalton's Just. Ca. 104 (i)*. And hence it was that in the cases of the treasons committed by *Arden* and *Somerville* (*k*) against Queen *Elizabeth*, both their wives were attaint of high treason, tho their execution was spared; and yet they were only accessaries to their husband's treasons, and not immediately actors in it, and so were principals in the second degree; and upon the same account the earl of *Somerset* and his wife were both attaint, as accessaries before, in the murder and poisoning of Sir *Thomas Overbury* (*l*).

4. If the husband and wife together commit larceny or burglary, by the opinion of *Braeton*, *Lib. III. cap. 32. §. 10 (m)*, both are guilty; and so it hath been practised by some judges. *Vide Dale. ubi supra, cap. 104.* and possibly in strictness of law, unless the actual coercion of the husband appear, she may be guilty in such a case; for it may many times fall out, that the husband doth commit larceny by the *instigation*, tho' he cannot in law do it by the *coercion* of his

(f) *F. Corone, 199. Braeton de Corone, cap. 32. § 9.*

(i) *N. Edit. cap. 157.*

(k) *1 And. p. 104.*

(g) *Leg. Inq. l. 57. B. Corone 108.*

(l) *Stat. Trials, Vol. I. Tr. 28 & 29.*

(h) Because the law supposes her to be then under the *coercion* of her husband. *Kel. 38.*

(m) *And ScH. 9. and Fleta, Lib. I. cap. 38. § 12, 13, 14. especially, Si fur- tum inventatur sub Clavibus Usorii. Vide Braeton & Fleta, ibid. and LL. Cant. l. 74.*

wife;

wife; but the latter practice hath obtain'd, that if the husband and wife commit burglary and larciny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book, 2 E. 3. *Corone* 160. And this being the modern practice and *in favorem vita* is fittest to be followed; and the rather, because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy (*n*); tho I confess this reason is but of small value, for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

And accordingly in the modern practice, where the husband and wife, by the name of his wife, have been indicted for a larceny, or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted; merciful judges have used to reprieve the wife before judgment, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband.

But this is not agreeable to law, for the indictment stands good against the wife, in as much as every indictment is as well several as joint; and as upon such an indictment the wife may be acquitted, and the husband found guilty, so *a converso* the wife may be convicted, and the husband acquitted; for the indictment is in law joint, or several, as the fact happens; as so is the book of 15 E. 2. *Corone* 383. and accordingly has been the frequent practice *Vide Dalt. ab i. sup. cap. 104.* where there are several instances of the arraigning of husband and wife upon a joint indictment of felony; which, if by law she could not be any way guilty, had been erroneous, for the indictment itself had been insufficient: therefore, tho the former practice be merciful, and cautious, it is not agreeable to law; for, tho ordinarily according to the modern practice the wife cannot be guilty, if the husband be guilty of the same larceny or burglary; yet if the husband upon such an indictment be acquitted, and the wife convicted, judgment ought to be given against her upon that indictment;

(n) The reason of this is, because a woman cannot by law have the benefit of the clergy, 11 Co. 29. b. yet in *Fitz. Corone* 461. it was admitted, that a woman might claim clergy; however, as the law now stands, she may in all cases have the same benefit by the statute of 3 & 4 W. & M. cap. 9. §. 7. as a man may by his clergy.

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for every indictment of that nature is joint or several, as the matter falls out upon the evidence. *Vide 22 E. 4. 7 (o).*

[47] 5. But if the husband and wife together commit a treason, murder, or homicide, tho' she only assented to the treason, they shall be both found guilty, and the wife shall not be acquitted upon the presumption, that it was by the coercion of her husband, for the odiousness, and dangerous consequence of the crime; the same law it is, if she be accessory to murder before the fact.

6. If the husband commit a felony or treason, and the wife knowingly receive him, she shall neither be accessory after as to the felony, nor principal as to the treason, for such bare reception of her husband; for she is *sub potestate viri*, and she is bound to receive her husband; but otherwise it is, of the husband's receiving the wife knowingly after an offense of this nature committed by her (*p*).

" M. 37. E. 3. Rot. 34. Linc. coram Rege. Ricardus Dey & Margeria Uxor ejus indictavit, pro receptamento felonum; Margeria dicit, quod indictmentum predictum super predictam Margeriam factum minus sufficiens est, eo quod praedicta Margeria tempore quo ipsa dicitur felones receptasse, seu eis consentire debuisse, fuit cooperata praedictum. Ricardo viro suo, & adhuc est, & omnino sub potestate sua, cui ipsa in nullo contradicere potuit; & ex quo non inseritur in indictmento praedicto, quod ipsa aliquod malum fecit, nec eis consentivit, seu ipsos felones receptavit, ignorante viro suo, petit judicium, si ipsa, vivente viro suo, de aliquo receptamento in praesentia viri sui occasionari possit. — Postea viro & diligenter examinato indictmento praedicto super prefatam Margeriam factum, videtur curiae, quod indictmentum illud minus sufficiens est ad ipsam inde ponere responsuram: Ideo cestus presentatus versus eam omnino, &c."

Upon which record these things are observable:

1. That the wife, if alone and without her husband, may be accessory to a felony *post factum*. 2. But she cannot together with her husband be accessory to a felony *post factum*; for it shall be intirely adjudged the act of the husband; and this is partly the reason, why she cannot be accessory in receipt of her husband being a felon, because she is *sub potestate viri*. 3. That in this case she was not put to plead to

[48] the indictment *not guilty*, but took her exception upon the indictment itself; and so note the diversity between an indictment of felony, as principal, and the indictment of her, as accessory.

(o) B. Chartre de gardo 51.

(p) Co. P. C. 101.

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after; for in the former case she shall be put to plead *not guilty* to the indictment, tho it appear in the body thereof, that she is *covert*. 4. That yet the indictment stood good, as to the husband; and upon this consideration, tho it is true the husband and wife may be guilty of a treason, as is before shewn, yet it seems, she shall never be adjudged a traitor barely for receiving her husband, that is a traitor, or for receiving jointly with her husband any other person that is a traitor, unless she were also consenting to the treason, for it shall be intirely adjudged the act of her husband.

It is certain a *feme covert* may be guilty of misprision of treason committed by another man than her husband: but whether she can be guilty of misprision of treason, if she knows her husband's treason, and reveal it not, is a case of some difficulty: on the one side the great obligation of duty she owes to the safety of the king and kingdom, the horridness of the offense of treason, and the great danger that may ensue by concealing it, seems to render her guilty of misprision of treason, if she should not detect it; on the other side, it may be said, she is *sub potestate viri*, she cannot by law be a witness against her husband, and therefore cannot accuse him. *Ideo quare*. But, certainly, if she consented to the treason of her husband, tho he were the only actor in it, she is guilty as a principal, and hath no privilege herein by her coverture, as is before shewn.

[Blackf. Com. ch. ii. page 33.—28. 1 Hawk. P. C. 2.]

C H A P VIII.

[49]

Concerning the civil incapacities by compulsion and ear.

I JOIN these two incapacities together, because they are much of the same nature, as to many purposes; and how far these give a privilege, exemption, or mitigation in capital punishments, is now to be considered.

First. There is to be observed a difference between the times of war, or public insurrection, or rebellion, and the times of peace; for in the times of war, and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compell'd, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace.

M. 21

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M. 21 E. 3. coram Rege. Rot. 101. Linc. “Walter de Alyngton, and divers of his confederates at St. Botolph’s Regiam potestatem affumentis, & ut de Guerrâ insurgentes quendam Thomam de Okeham futorem in capitaneum, & majorem suum eligerunt,” seized on two ships, and took away the corn (*a*) ; appointed a bell to be rung (*b*) ; and commanded, that at the ringing thereof ipsi & eorum quilibet essent parati, &c. “Et plures homines villæ prædictæ, qui ad maleficia sua consentire noluerunt, ceperant, & eos sibi jurare fecerunt ad imprisas suas manutencendas.” They were arraigned upon the indictment, and committed : “Illi, qui coætti fuerunt jurato, dimittuntur per manu-“ captionem ; & illi, qui receperunt denarios, petunt quod, ex quo patet “per indictamentum prædictum, quod ipsi coætti fuerunt recipere dena-“ rios contra voluntatem suam, petunt, quod possint quieti recedere ; & [50] “consideratum est per curiam, quod nihil malū in his reperitur ; sed quia curia nondum advisatur, dies datus est per manucap-“ tionem ; ideo venit iurata.” I find no further proceeding against them.

M. 7 H. 5. coram Rege. Rot. 20. Heref. cited Co. P. C. p. 10. Those, that supplied with victuals Sir John Oldcastle, and his accomplices then in rebellion, as is said, were acquitted by judgment of the court ; because it was found to be done pro timore mortis, & quod recesserunt, quam cito potuerunt : note, it was only furnishing of victuals, and pro timore mortis, which excused them : for after the battle of Evesham in 49 H. 3. when that prudent act was made for the settling of the kingdom, called *Dictum de Kenilworth*, those, that were drawn to assist the barons against the king, tho they were not put into the rank of those that paid five years value of their lands for their assistance, viz. those, that gratis, & voluntarie, & non coætti miserunt servitia sua contra regem, & ejus filium (*c*) ; yet, it seems, they were put to a smaller mulct ; for by the 12th, 13th, 14th, and 15th articles : “Coætti, vel metu ducti, qui venerunt ad bella, nec pugnaverunt, “ nec male fecerunt ; impotentes, qui vi vel metu coætti miserunt servitia sua contra regem, vel ejus filium ; coætti, vel metu ducti, qui fuerunt “ deprædatores, & cum principalibus prædonibus prædationes fecerunt,

(*a*) One hundred and twenty quarters of corn, value 36*l.*

(*b*) Quendam communem campanam ordinaverunt pulsari.

(*c*) Nor into the rank of those, who by lies and falsehood had drawn off others to the earl of Leicester’s party, and were punished with a mulct of two years value, as

by Artic. 11. “Laici manifeste, procurantes negotia comitis Lecestræ & complicium suorum, attrahendo ho-“ mines per mendaciam & falsitatem, infili-“ gando parti comitis & suorum, detra-“ bendo parti regis & filii sui, puniantur “ per quantum valet terra eorum per duos annos.”

“ & quonda-

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“ & quanda commode potuerunt, recesserunt, & ad domos redierunt;
“ [emptores scienter rerum alienarum valorem bonorum, que emerunt,
“ restituant, & in misericordia domini regis sint, quia contra justitiam
“ fecerunt, quia rex inhibuit, jam dimidio anno elapso;] illi, qui ad
“ mandatum comitis Leycestriae ingressi sunt Northampton, nec pugna-
“ verunt, nec malum fecerunt, sed ad Ecclesiam fugerunt, quando regem
“ venientem viderunt, & hoc sit attinetum per bonos, solvant, quantum
“ valet terra eorum per dimidium annum; illi, qui ex feodo comitis tene-
“ bant, sint solum in misericordia domini regis: impotentes, & alii
“ homines, qui nihil mali fecerunt, statim rehabeant serrras [51]
“ fuas, & damna recuperent in curia domini regis.”

But even in such cases, if the whole circumstances of the case be such, that he can sufficiently resist, or avoid the power of such rebels, he is inexcusable, if upon a pretence of fear, or doubt of compulsion, he assist them.

Now as to times and places of peace.

If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death does not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis* (*d*).

Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: but if he cannot otherwise save his own life, the law permits him in his own defense to kill the assailant; for by the violence of the assault, and the offense committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own *protecto^r cum debito modera^mine inculpatæ tutelæ*, as shall be farther shewed, when we come to the chapter of homicide *se defendendo* (*).

But yet farther, it is true in cases of war between sovereign princes the law of nations allows a prince to begin hostility with such a prince that designs a war against him; and if the fear be real, and upon just ground, *non tantū de potentia sed & de animo*.—*Grot de jure belli & pacis*, Lib. II. cap. 22. §. 5. he may prevent the other's actual aggression, and need not expect, till the other actually invade him, when

(d) See this writ in the Register, fol. 88. b. F. N. B. V. et. Edit. 79. N. Edit. 177.

(*) *Pufca* cap. 33.

possibly

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possibly it may be too late to make a safe defense; and the reason is because they are not under any superior, that may by his [52] process or interposition secure the prince against such a just fear; and therefore in such case the law of nations allows a prince to provide for his own safety.

But it is otherwise between subjects of the same prince: If *A.* fears upon just grounds, that *B.* intends to kill him, and is assured, that he provides weapons, and lies in wait so to do; yet without an actual assault by *B.* upon *A.* or upon his house, to commit that fact, *A.* may not kill *B.* by way of prevention; but he must avoid the danger by flight, or other means; for a bare fear, tho upon a just cause, and tho it be upon a fear of life, gives not a man power to take away the life of another, but it must be an actual and inevitable danger of his own life; for the law hath provided a security for him by flight, and recourse to the civil magistrate for protection by a writ or precept *de securitate pacis*: and thus far touching the privilege by reason of compulsion or fear.

[4. Blackf. Com. ch. i. p. 30.]

C H A P. IX.

Concerning the privilege by reason of necessity.

ALTHO all compulsion carry with it somewhat of necessity, and abates somewhat of the voluntariness of the act that is done, yet there are some kinds of necessities, that are not by any external compulsion or force.

Touching the necessity of self-preservation against an injurious assault somewhat hath been said in the last chapter, and more will be said hereafter in its due place: I shall proceed therefore to other instances.

[53] The necessity of the preservation of the peace of the kingdom by the apprehending notorious malefactors excuseth some acts from being felony, which in the matter of them without such necessity were felony.

If a thief resist, and will not suffer himself to be taken upon hue and cry or pursuit, *jussiciari se nobilit permittere*, if he be killed by the purfuyants, it is no felony (*a*); *de quo vide latius infra.*

(a) See Leg. Ins, l. 25.

By

By the statutes of 3 & 4 E. 6. cap. 5. and 1 Mar. cap. 12. If there be a riotous assembly to the number of twelve assembled to commit the disorders mentioned in those acts, the justices of peace, the sheriff, mayor, or other officer of any corporation, &c. may raise a power to suppress and apprehend them ; and, if they disperse not upon proclamation, if any of the rioters be kill'd, or maimed, or hurt by the justices, &c. or those assembled by them to suppress the riot, it is by this act dispuishable.

It is true, this act (*b*) continued only during queen Elizabeth's life, and is now expired (*c*) ; but altho, perchance, as to the killing of such persons, as do not presently return upon proclamation to their homes, it needs the aid of an act of parliament to indemnify them ; yet if they attempt any riotous act, and cannot be otherwise suppressed, the sheriff, or justice of peace may make use of such a force upon them for preservation of the peace, as well by the Common law, as by the statute : *quod vide in Anderson's Rep. part 2. n. 49. p. 67. Burnet's case in fine* ; and the statute of 13 H. 4. cap. 7. in principio, and 2 H. 5. cap. 8. whereby all men are bound, upon warning, to be assistant to the sheriff and justice for the suppressing of riots even by force, if it cannot be otherwise effected ; so that the clauses touching this matter in the temporary statutes of 3 & 4 E. 6. and 1 Mar. are but pursuant to the law and former statutes for necessity of preserving the peace.

Some of the casuists, and particularly *Covarruvias, Tom I. De furti & rapina restitutione*, §. 3. 4. p. 473. and *Grotius de jure belli ac pacis*, Lib. II. cap. 2 §. 6. (*d*) tell us, that in case of extreme necessity, either of hunger, or clothing, the civil distributions of property cease, and by a kind of tacit condition the first community doth return, and upon this, those common assertions are grounded ; “ *Quicquid necessitas cogit, defendit.* ” “ *Necessitas est lex temporis & loci.* ” “ *In casu extremæ necessitatis omnia sunt communia.* ” and therefore in such case theft is no theft, or at least not punishable, as theft ; and some even of our own lawyers (*e*) have asserted the same ; and very bad use hath been made of this concession

(*b*) viz. 1 Mar. cap. 12. for 3 & 4 Ed. 6. cap. 5. was repeal'd by 1 Mar. cap. 12.

(*c*) It was at first made to continue only till the end of the next session, but was afterwards by several new acts continued during the life of queen Mary ; and by 1 Eliz. cap. 16. was continued during her life also, and has never since been revived ; but in

1 Geo. 1. cap. 5. a new act was made to much the same purpose, which is perpetual.

(*d*) See *Puff. de jure naturæ*, Lib. II. cap. 8. §. 6.

(*e*) *Britton*, cap. 10. *Cromp. 33. a. Blund. 18. b. 19. a. Dab. Just. cap. 99.*

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by some of the Jesuitical casuists in *France*, who have thereupon advised apprentices and servants to rob their masters, when they have judged themselves in want of necessaries, of clothes, or victuals; whereof, they tell them, they themselves are the competent judges; and by this means let loose, as much as they can, by their doctrine of probability, all the ligaments of property and civil society.

I do therefore take it, that, where persons live under the same civil government, as here in *England*, that rule, at least by the laws of *England*, is false; and therefore, if a person, being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man's goods, it is felony (*f*) and a crime by the laws of *England* punishable with death; altho the judge, before whom the trial is, in this case (as in other cases of extremity) be by the laws of *England* intrusted with a power to reprieve the offender before or after judgment, in order to the obtaining the king's mercy.

For 1. Men's properties would be under a strange insecurity, being laid open to other mens necessities, whereof no man can possibly judge, but the party himself.

2. Because by the laws of this kingdom (*g*) sufficient provision is made for the supply of such necessities by collections for the poor, and

[55] by the power of the civil magistrate; and consonant hereunto seems to be the law even among the *Jews*, if we may believe the wisest of kings. *Proverbs vi. 30, 31,* “*Men do not despise a thief, if he steal to satisfy his soul, when he is hungry; but if he be found, he shall restore seven-fold, and shall give all the substance of his house:*” It is true, death was not among them the penalty of theft, yet his necessity gave him no exemption from the ordinary punishment inflicted by their law upon that offense (*h*).

Indeed this rule, “*in casu extremæ necessitatis omnia sunt communia,*” does hold in some measure in some particular cases, where by the tacit consent of nations, or of some particular countries or societies, it hath obtain'd.

1. Among the *Jews* it was lawful in case of hunger to pull ears of standing corn, and eat, *Matth. xii. 1. &c.* (*i*) and for one, that

(*f*) See *Dalton ubi supra.*

(*g*) 43 *Eliz. cap. 2. &c.*

(*h*) But their ordinary punishment being only pecuniary could affect him only when he was in a condition to answer it; and therefore the same reasons, which would justify that, can by no means be extended

to a corporal, much less to a capital punishment.

(*i*) For the *Pharisees* objected against it only on account of its being done on the *sabbath-day*, *Mark xii. 23. &c. Luke vi. 1, &c.*

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pased through a vineyard, or oliveyard, to gather, and eat without carrying away. *Deut.* xxiii. 24, 25.

2. By the *Rhodian law* (*k*), and the common maritime custom, if the common provision for the ship's company fail, the master may under certain temperaments break open the private chefts of the mariners or passengers, and make a distribution of that particular and private provision for the preservation of the ship's company. *Vide Consolato del Maré, cap. 256 (l).* *Les customes de la Mere, p. 77.*

3. Nay, I find, among our *English* voyages to the *West-Indies* described by *Hackluit*, that it was a received custom, that if a ship wanted necessaries, and the inhabitants of the continent would not furnish them for money, they might, by the usage of the sea and nations, take provision by force, making the inhabitants reasonable satisfaction; for in these cases the common consent of nations hath made it lawful, and therefore it is lawful; 1. because necessary in extremity; 2. because there are no other means to obtain it [56] by an application to superiors; but were this done by *English* mariners upon the *English* shore, where both are under the same civil magistrate the case would be otherwise, because capable of another remedy.

It is not lawful voluntarily to affit the king's enemies with money or provision, for it is an adhering to the king's enemies, and so treason within the letter of the statute of 25 E. 3. but yet, if the king's enemies come into a county with a power too strong for the county to resist, and will plunder the country, unless a composition be made with them, such a ransoming of themselves is so far from being treason, that it hath been allowed as lawful. 1. In respect of the extreme necessity. 2. Because it is a less detriment to the country, and a less supply to the enemy, than that plunder would be; and for that purpose I shall set down the case at large.

M. 14 E. 2. B. R. Rot. 60. Dunelm. "Placitum de transgress.
" coram A. D. de Brome & sociis suis justiciariis domini Regis in
" episcopatu Dunelm. sede vacante anno decimo regni sui mittitur huc
" propter errores, &c. Juratores dicunt, quod Scotti inimici & rebelles
" regis prædict. die Martis in festo Sanctæ Catharinae virginis anno
" regni regis nunc nono ingressi fuerunt terram episcopatus Dunelm.
" eâ de causâ, ut ipsam destruerent, & quod omnes de communitate

(k) *Vide Dig. Lib. XIV. tit. 2. de lege licet Conquest. cap. 38.*
Rhodia de jactu, L. 2. §. 2. in fine. Leg. Gu- (l) Printed at Venice 1584. in 4m.

" episcopatus

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“ episcopatus prædicti tunc apud *Dunelm.* existentes, volentes præ-
“ cavere dictorum inimicorum malitiā, ordinārunt, quod unus-
“ quisque illorum præstarent sacramentum corporale stare ordinationi,
“ quæ pro proficuo communitat̄is prædictæ continget ordinari, qui
“ quidem *Willielmus de Heberne* jurat' fuit cum aliis, &c. Item quod
“ post consuluerunt facere finem cum prædictis inimicis, & cum eis
“ fecerunt finem de mille & sexcent' marc'; quam quidem summam
“ oporteret solvi incontinenti per quod, quia non habuerunt pecu-
“ niām prestat, ordinārunt, quod quidam de communitate prædicta
“ irent de domo in domum infra ball.' *Dunelm.* & extra, & perscrutu-
“ tarent ubi denarii essent in deposito, & ubique; denarii hujusmodi
“ invenirentur, caperentur ad solutionem dicti finis festinand',
“ quousq; levari possit de communitat̄. prædict. & satisfieri illis,

[57] “ quorum denarii sic capiendi fuerunt; et quod prædictus

“ *Willielmus de Kellawe* simul cum quodam *David de*
“ *Rotheber* jurat' ad perscrutandum in formâ prædictâ venit ad præ-
“ dictas domos, & cistam & 70l. de propriis denariis ipsius *Willielmi*
“ *de Heberne* in cista prædicta inventas cepit & asportavit, &c. Et
“ juratores requisiti, si prædictus *Willielmus de Heberne* consentiebat
“ captioni prædictorum denariorum, dicunt, quod non, & quia com-
“ pertum est, &c. quod ubi prædicta ordinatio fuit facta de denariis
“ in deposito perscrutand' & capiend', prædict' *Willielmus de Kellawe*
“ simul, &c. cepit denarios prædict', qui fuerunt in domo & propriâ
“ custodiâ prædicti *Willielmi de Heberne* & contra voluntatem suam,
“ & etiam pro eo, quod videtur curiae, quod prædict' *Willielmus de*
“ *Heberne* omnino effet sine recuperare, quoad denar' suos prædict',
“ nisi effet versus præfat' *Willielmum de Kellawe*, &c. qui prædictos
“ denarios in formâ prædictâ cepit & asportavit, consideratum est,
“ quod prædict' *Willielmus de Heberne* recuperet versus prædict' *Wil-*
“ *lielnum de Kellawe* prædictos denarios & dampna sua, quæ taxantur
“ ad c. s. & idem *Willielmus de Kellawe* committatur gaolæ, &c.
“ prætextu cuius recordi ad sectam prædicti *Willielmi de Kellawe*, af-
“ ferentis errores & defectus in prædictis recordo & processu interesse,
“ mandatum fuit episcopo *Dunelm.* quod scire fac' prædicto *Willielmo*
“ *de Heberne*, &c. qui non venit.

“ Ideo processum est ad examinationem recordi per ejus defaltum,
“ & assignat hos errores; primū, quod nihil fecit contra pacem
“ regis, nec denarios illos cepit vi & armis, maximè cum prædictus
“ *Willielmus de Heberne* juratas fuit stare ordinationi prædictæ, &
“ quod

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" quod ipse *Willielmus de Kellawe* per sacramentum præhibitum in-
" junctus fuit scrutari & denarios prædictos capere; & non est con-
" sonum, quod dictus *Heberne* recuperaret prædictos denarios &
" dampnum contra assensum & juramentum suum proprium, nec
" quod ipse *Kellawe* committeretur goalæ.

" Item in hoc quod justic' fundaverunt judicium suum, quod dictus
" *Heberne* non posset habere suum recuperare de denariis prædictis,
" cum illud habere posset directè versus communitatem vir- [58]
" tute ordinationis & concessionis prædictarum, &c. ob quos
" errores hic in judicio recitatos consideratum est, quod erronicè in
" primo judicio processum est, & quod idem *Kellawe* a gaola deli-
" beretur; & totus processus evacuetur, &c."

In Pasch. 15. Rot. 17. " Patet, quod Scotti cum hominibus de
" *Rippon* similiter concordârunt pro mille marc', nè villa combu-
" retur."

Nota, this was an act done for the security of the country in a time of actual war and invasion by enemies, and therefore rendered that by-law and the execution thereof justifiable by reason of that necessity, which would hardly have done it in time of peace. 2. But that, which this record principally evidenceth, is, that such a supply of the king's enemies upon such a necessity in a time of war, and to prevent the devastation of the country, was not taken at all to be an adhering to, or treasonable aiding of the king's enemies.

[4. Blackf. Com.ch. ii. p. 31.]

CHAP. X.

Concerning the offense of high treason, the person against whom committed, and the reason of the greatness of the offense; and touching alligence.

HAVING premised these general observations relating to all crimes, that are capital, and their punishments, I shall now descend to consider of capital crimes particularly, and therein first of high treason.

And yet, before I descend to the particulars thereof, I shall premise also some things in general touching alligence, since the specification

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of this offense consists principally in this aggravation, that it is *contra ligantia suæ debitum*.

[59] The offense of high treason is an offense, that more immediately is against the person or government of the king; and the greatness of the offense, and the severity of the punishment is upon these two reasons.

1. Because the safety, peace, and tranquillity of the kingdom is highly concerned in the safety and preservation of the person, dignity, and government of the king; and therefore the laws of the kingdom have given all possible security to the king's person and government under the severest penalties.

2. Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the king; and hence all indictments of high treason run *proditorie*, as a breach of the trust, that is owing to the king; *contra ligantia suæ debitum*, against that faith and allegiance he owes to the king, and *contra pacem domini regis, coronam, & dignitatem ejus*.

And hence it is, that if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor allegiance: resolved in the lord Herife's case. *Co. P. C. cap. 1. p. 11. 7 Co. Rep. 6. a. Perkin Warbeck's case.*

But if an alien, the subject of a foreign prince in amity with the king, live here, and enjoy the benefit of the king's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance. *7 Co. Rep. 6. the case of Stephano Ferrara (a) a Portuguese; and the indictment shall not run contra naturalem dominum, but contra dominum suum, and conclude contra ligantia suæ debitum*; and such an alien was compellible to take the oath of allegiance in the leet. *2 Co. Instit. p. 121 (b)*.

If a merchant, subject of a foreign prince in hostility with our king, come hither, after the war begun, without the king's licence, or safe-conduct, such a person may be dealt with as an enemy, *viz.* taken, and ransomed. *Mag. Chart. cap. 30 (c)*.

[60] By that statute merchants of an hostile country found in this realm at the beginning of the war shall be attached with-

(a) And Emanuel Lewis Tinoco. *Hill. 36*
Eliz. Dyer 145.

(b) *Mirroir de justice, cap. 5. §. 1. n. 6.*
(c) *2 Co. Instit. 58.*

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but harm to their body or goods, till it be known, how the *English* merchants are used in the hostile country; and if the *English* merchants be well used there, theirs shall be likewise used here; so that in this case such merchants, tho' alien enemies, have the benefit of the king's protection, and so owe a local alligeance, which if they violate, they may be dealt with as traitors, not as enemies, for they have the advantage of the king's protection, as well as his other subjects; yea, it seems also, that if the subject of a foreign prince lives here as a private man, and then war is proclaimed betwixt our king and that foreign prince, and yet that alien continues here in *England* without returning to his natural sovereign, but under the cover and protection of the king of *England* commits a treason, he shall be judged and executed as a traitor; for by continuing here he continues the owning of his former local alligeance.

Yet for the greater security in the times of hostility between this and foreign kingdoms, especially that of *France*, there went out precepts under the great seal to arrest all those of that hostile kingdom, until they gave surety, *quod se bene gerent erga regem, & quod sua bona non transferent sine licentiâ regis, & quod literas aut nuncios non mittent ad partes externas, nec aliquid contra pacem attemptabunt.* *Rot. Vascon.* 18 E. II. M. 24, 23 & 21. *Doro.* And sometimes those aliens were constrain'd actually to swear fealty to the crown of *England* in the times of hostility, and thereby to superadd an actual alligeance to that local alligeance, which they had being under the king's protection as subjects, tho' in truth they were the natural subjects of the hostile prince. *Pat. 14. H. 6. part. 2. m. 34. & 35.* and, if they refused, were either imprisoned, or expelled the kingdom. *Vide infra cap. 15.*

And upon the same account it is, that tho' there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise treason against his person; and therefore, altho' the true prince regain the sovereignty, yet such attempts against the usurper in compassing his death have been punished as treason, unless they were attempts made in the [61] right of the rightful prince, or in aid or assistance of him, because of the breach of liegeance, that was temporarily due to him, that was king *de facto*; and thus it was done 4 E. 4. 9 E. 4. 1 (*d*): tho' *H. 6.* was declared an usurper by act of parliament 1 E. 4. and

(*d*) It was not done in this case, but only it is said by the counsel, that it may be done.

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therefore king Edward IV. punished Ralph Grey with degradation, as well as death, not only for his rebellion against himself, but also *pur cause de son perjury & doublenes, qu'il avoit fait al roy H. 6. 4 E. 4. 20.*

And because high treason is said to be *contra ligantia debitum*, it will not be amiss to premise something touching alligance and its kinds, referring myself to *7 Co. Rep. Calvin's case*, in relation to what is here omitted touching it.

Alligance therefore due to the king is of two kinds: 1. Original, virtual, and implied. 2. Express, and declar'd by oaths or promises.

The virtual or implied alligance is that, which the subject owes to his sovereign antecedently to any express promise, oath, or engagement: this is that, which the *Custumer de Normandie* mentions cap. 13. *Alliance & la loyaulte de tous ses homes de toute la contree, par quoy ils sont tenus a lui donner conseil & ayde de leurs propres corps contre toutes personnes qui peuvent vivre & mourir & soy garder de lui nuyre en toutes choses ne de soustenir in aucune chose la partie de ceulz qui parlent contre lui.*

And from the breach of this original ligance ariseth, the crime of treason, tho' the person committing it never promised or swore faith or alligance to his prince: for as the king by the very descent of the crown is fully invested with the right of sovereignty before his coronation, (which is only a magnificent solemnity attending that, which is before settled in the prince by the descent of the crown,) so the subject is bound to his king by an intrinsic alligance before the superinduction of those express bonds of oath, homage, and fealty, which were instituted for the better securing thereof.

[62] And this alligance is either natural from all that are subjects born within the king's alligance; or local, which obligeth all, that are resident within the king's dominions, and partake of the benefit of the king's protection, altho' strangers born.

The breach of this primitive or virtual alligance is that, which is called high treason; what shall be said of breach of this alligance, so as to make a person guilty of treason, shall be shewn hereafter.

The express or explicit alligance consists in certain promises, oaths, or professions attesting and witnessing that alligance, and instituted for the farther security thereof: and they are of two kinds; first, those, which were antiently instituted by the Common law, namely the oath of fidelity and alligance, and the profession of lige homage; and such, as are instituted by act of parliament, namely the oath of supremacy

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supremacy instituted by the statute of 1 Eliz. (e), and the oath of obedience instituted by the statute of 3 Jacobi (f). Something I shall say of all these.

The oath of fidelity or fealty is of two kinds: 1. That which is due by tenure, whether of the king, or of mesne lords, which is *ratione feodi vel vasallagii*, and hath a special relation to the lands so held, and is set down by *Lyttleton*, §. 19. "Hear ye, my lord, I " shall be faithful and loyal, and faith to you shall bear for the tene- " ments, which I claim to hold of you, and I shall lawfully do to " you the customs and services, which I ought to do at the tenures af- " signed. So help me God."

Touching this feudal fealty, or fealty by reason of tenure, I have not much to do in this place. The other kind of fealty is that oath, which is called *fidelitas ligia*, or *alligance*, and performed only to a sovereign prince, and therefore regularly ought to be performed by all men above the age of twelve years, whether they hold any lands or not. The tenor of this oath according to *Fleta*, *Lib. III. cap.*

46. (g), runs thus: "Hoc auditis, circumstantes, quod [63] " fidem regi portabo de vita, & membris, & terreno honore, & arma " contra ipsum non portabo: sic me Deus, &c."

According to *Britton*, who wrote about 5 E. 1 cap. 29. (which is also mentioned in *Calvin's case*, 7 Co. Rep. 6.) the common form of the oath of alligance taken in leets runs thus: "Ceo oyés vous N. " bailife, que jeo A. de ceo jour en avaunt ferray feal, & leal a nostre " seigniour E. roy d'Angleterre, & a ses heires, & foy & lealte lui " porteray de vie, & de membre, & de terrien honour, & que jco " lour mal, ne lour damage, ne faveray, ne orray, que jeo ne le de- " fendray a mon poyer: si moy eyde Dieu & les Seyntz." This is the form of the antient oath of alligance, or fidelity to the king, and as it is used at this day; and he that is minded to see the antiquity of it, may read thereof 7 Co. Rep. 7. *Calvin's case*, *Spelman's Gloss. Titulo Fidelitas*, which carry it up as high as king *Arthur*; more particularly it was established by the laws of the Confessor (h), and by the

(e) cap. 1.

(f) cap. 4. [vide 7 Jac. I. cap. 2. &c. 6.

13 Car. II. St. 2. cap. 1. 13. & 14 Car. II.

cap. 3. & 4. 25. Car. II. cap. 2. 30. Car.

II. St. 2. cap. 1.] But these oaths are ab-

rogated by 1. W. & M. Sess. 1. cap. 1 &

8. and new ones appointed in their room;

see 1. W. & M. Sess. 2. cap. 2. §. 3. and 3.

W. & M. cap. 2. 13. W. 3. cap. 6. 1.

Anno cap. 22. 4 Anne, cap. 8. 6 Anna,

cap. 7, 14, 23. 1 Geo. I. cap. 13, &c.

(g) See. 22.

(h) L. 35, but these laws are evidently spurious, and seem to be the composition of some lawyer after the reign of William II. Vide *Hickfi Diffr. Epist. p. 95.* and even in the best Ms. copies of these laws the legendary account of king *Arthur* is omitted.

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laws of king *William I.* quod vide in *Spicilegiis Seldenii ad Edmerum* lege 52 (*i*) "Statuimus, ut omnes liberi homines scedere & sacra-
" mento affirment, quod intra & extra universum regnum Angliae
" Willielmo regi domino suo fideles esse volunt, terras & honores illius
" omni fidelitate ubique servare cum eo & contra inimicos & alieni-
" genas defendere (*k*)."

And herein the prudence of the Common law is observable; the antient oath of alligance, 1, was short, and plain, not intangled with long and intricate clauses or declarations, but the sense of it is obvious to the most common understanding; and yet, 2. it is comprehensive of the whole duty of the subject to his prince, and therefore hath obtain'd for above six hundred years in this kingdom; and if any difficulties shoud occur in the sense or extent thereof, length [64] of time and long experience and practice hath sufficiently ex-
pounded it.

I shall subjoin some observables concerning this oath, which indeed explain that implied and virtual alligance, whereof before.

1. By whom this oath is to be taken: It is to be taken by all persons above the age of twelve years, whether denizens or aliens, 2 *Co. Insit.* p. 121. except women, earls, prelates, barons, and men of religion, according to *Britton*, cap. 12. which exception is not to be absolutely and universally understood; for all persons above the age of twelve years are bound to take this oath of alligance, except women, as shall be shewn, but not in the same manner or place, as others; but because regularly this oath was to be taken in the leet, or at least in the sheriff's turn, which is in nature of a leet, where earls, barons, prelates, and men of religion were not bound to do their suit, therefore by the statute of *Marlbr.* cap. 10. is this exception added: but yet at other times and in other places men of religion and noblemen were to take it: as shall be shewn.

It differs from the oath of fealty perform'd to the king by tenure, for that includes somewhat more, and somewhat less; and according to *Britton*, cap. 68. (*l*) runs thus when perform'd to the king: "Ceo
" oyes vous bone gents qe jeo J. S. foy a nostre seignior le roy Edward por-
" terai de ceo jour en auant de vie & de membre, de cors & de chateux,
" & de terrene honor, & les services qe a lui appendent de fees & de te-

(i) *Vide Leg. Anglo-Sax. Edit. Wilkins, Clarendon & renovata apud Northampton.*
p. 228. *Edit. Lambard,* p. 170. *Howden,* p. 314. *Edit. Savil.*

(k) *Vide assissi Henrici regis factas apud*

(l) § 479.

" nementis,

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“ nements, que jeo teigne de lui, leaument les ferray as termes ducs a mon poer : si moy ayde Dieu & les Seyntz, &c.”

Now, besides this oath of fealty or alligence to the king, there were anciently certain oaths administered to persons of a different age ; but these have been long disused, as namely that, which *Britton* mentions cap. 12. viz. that all above the age of fourteen years (*m*) should swear to be true and faithful to the king, and that they should not be felons nor assenters to felons, excepting men of religion, women, clerks, knights, and their eldest sons (*n*) ; and of the like nature was that oath appointed by king *Henry III.* to be taken by all men above fifteen years, consisting of divers particulars in order to the preservation of the peace, and mention'd at large by *Braffon*, Lib. III. Tratt. 2. cap. 1. *de Corona* ; both which it seems were temporary provisions for preservation of the peace, and therefore administered to persons above fourteen and fifteen years, and differd from this settled oath of alligence above mentioned. [65]

2. What kind of oath of fidelity this is : As there is *homagium ligatum*, and *homagium simplex*, so there is *fidelitas ligea* and *fidelitas simplex* ; this, that is perform'd to the king, is *fidelitas ligea*, and differs from the later, 1. In that this is perform'd to a king, the other to a mesne lord. 2. This is perform'd without relation to any tenure of lands. 3. This is without exception of the fidelity to any person, that is always *salvâ fide & ligeantia domini regis*.

Yet there seems to be a double kind of lige fealty : as where there is a prince, that is subordinate to another, and yet hath *jura summi imperii* over his subjects : such was the king of *Scots*, whilst in some times of *Edward I.* and *Edward III.* he was in subjection to the crown of *England* ; such was the prince of *Wales* before the conquest thereof by *Edward I.* and the full union of it to the crown of *England* ; and thus it was in many investitures made formerly by the kings of *England* : for instance anno 35 *H. 3.* when that king gave to his son *Edward* the principality of *Gascoigne* in *France*, so that the great men of that country *fecerunt ei homagium & fidelitatis juramentum* ; yet

(m) This probably should be twelve years. See 2 Co. *Instit.* 147. *Vide supra in notis*, p. 24.

(n) This exception seems not to relate to the oath, but to the being in a *decenna* or *tithing*. The whole passage runs thus :

“ Volons nous, que trea tous ceux de xiiii

“ ans de southe nous facent le serement,
“ que ils nous ferrount feaux & leaux, &
“ que ils ne ferrount felons, ne a felons af-
“ ftaunts, & volons, que toutz soient en
“ dizeyne, & plevys par descyners, sauve
“ gentz de religion, cleris & civalers &
“ lours fi'z eynes, & femes.”

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Matthew Paris (*o*) tells us, that *dominus rex tamen sibi retinuit principale dominium, scilicet ligeantiam.*

The like was done by *E. 3.* when *Rot. Vasing.* 36 *E. 3. m. 18.* the king had given to the *Black Prince* the principality of *Aquitain* with

[66] a regal jurisdiction, *viz. merum & mixtum imperium*, so that in relation to the subjects of *Aquitain* he was in nature of a sovereign; yet the king not only reserved *homagium ligeum* to be perform'd to him by the prince, but also reserved his own sovereignty, *viz. Dominio directo & superioritate nobis semper specialiter reservatis*: by reason whereof the king did not only substitute his delegates or judges *de la sovereignty et de resort* to receive appeals from the prince, as appears by *Mr. Selden's Tit. Honoris, part 2. cap. 3. §. 4.* but was intitled to a superior alligance of all the subjects of *Aquitain*: so that here were two alligances; one due to the prince, which was qualified and restrained, *salvâ fide regis*; and the other absolute, which was due to the king as supreme.

Again, when in the year 1170. *Hen. 2.* by consent of parliament (*p*), as it seems, (for otherwise it could not be done) made his eldest son king of *England*; so that there was *rex pater*, and *rex filius*, yet he reserved to himself the supreme alligance of all his subjects: "Et in crastino coronationis illius rex pater fecit *Willielmum regem* "Scotorum, & *Davidem fratrem suum, & comites, & barones regni* "devenire homines novi regis, & jurare ei fidelitatem contra omnes "homines, salvâ fidelitaté suâ;" Quod vide apud *Hoveden sub eodem anno* (*q*), and the instrument itself at large *apud Brompton*, *p. 1104. (r)*: "Hæc est conventio & finis, quæ *Willielmus rex Scotorum* "fecit cum domino suo *Henrico rege Angliæ filio Matildis imperatoris*, *viz. quod dictus Willielmus rex Scotorum devenit homo ligeus* "domini regis Angliæ contra omnem hominem de Scotia, & de omnibus terris suis aliis, & fidelitatem ei fecit, ut ligeo domino suo, "sicut alii homines suo principi facere solent; similiter fecit *homagium Henrico filio suo, & fidelitatem, salvâ fidelitate domini regis patris sui, &c.* Comites & barones de terrâ regis Scotorum, de quibus dominus rex Angliæ homagium habere voluerit, facient ei homagium contra omnem hominem, & fidelitatem, ut ligeo domino suo,

(o) *p. 845.*

(p) *Hoveden sub anno 1170, Brompton, p. 1061.*
(q) *Et sub anno 1175.*

(r) *Et in libro rubro scaccarii, fol. CLXVI. & Rymer's Federæ, Vol. I. p. 39. ex magno rotulo feneris Cappellar.*

" *sicut*

"sicut alii homines sui ei facere solent, & *Henrico regi filio suo & hæredibus suis, salvâ fidelitate domini regis patris sui.*"

Here was first the supreme king, namely *rex pater*, who did not oust himself of his regality, as some have mistaken, but had the sovereignty still, for he reserved his ligeance from the new king, and from all his subjects; yea, and in farther testimony thereof the *rex filius* in the year 1175. did his father lige homage, and swore allegiance *contra omnes homines*, as appears by *Hoveden*. Secondly, Here is a subordinate king, *rex filius*, who, tho in relation to his father he was a subject, yet in relation to his subjects, and particularly to the king of *Scots*, was a sovereign. Thirdly, Here is yet another subordinate king, *William the king of Scots*, who was a sovereign in relation to his subjects; and altho there was an allegiance or *fidelitas ligea* due by the subjects of *Scotland* to their king *William*, yet it was *salvâ fidelitate* to the kings of *England*, father and son; and tho there was a lige fealty due to *rex filius*, yet it was *salvâ fide regis patris*; but the fidelity or allegiance to the *rex pater* was purely *fidelitas ligea*, for it had no exception.

3. The third observable upon this oath of allegiance is, that it is not only applicable to the politic capacity of the king, but to the person of the king, as well as to his office, or capacity; and for the misapplication of the allegiance to the regal capacity or crown, exclusive of the person of the king, among other things the *Spencers* were banished. *Vide Judicium inde in Veteri Magnâ Chartâ & 7 Rep. 11. Calvin's case*, for the oath is to be applied to the person of the king, as well as his crown.

4. That in all oaths of fealty, as likewise in the profession of homage to any inferior or subordinate lord or prince, it must be *salvâ fide & ligeantia domini regis*; and to omit this saving is punishable in such lord: see for this the notable Record of 6 E. 1. against the bishop of *Exeter*. *Co. Litt. §. 85. (f.)*, and it is no more than is used in other kingdoms. *Vide Spelm in titulo Fidelitas*. The emperor *Frederic Barberossa* in the year 1152. made a law, that within his empire *in omni sacramento fidelitatis imperator nomination excipiatur*, which obtained presently the like observation in all other countries, and accordingly is the *Custumer de Normandy, cap. 29 & Glossa 2 da. Ibidem.* [68]

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5. That tho' there may be due from the same person *subordinate alligeances*, which tho' they are not without an exception of the fidelity due to the superior prince, yet are in their kind *sacramento ligae fidelitatis*, or *subordinate alligeances*, yet there cannot, or at least should not be two or more co-ordinate absolute *ligeances* by one person to several independent or absolute princes; for that lawful prince, that hath the prior obligation of alligeance from his subject, cannot lose that interest without his own consent by his subject's resigning himself to the subjection of another; and hence it is, that the natural-born subject of one prince cannot by swearing alligeance to another prince put off or discharge him from that natural alligeance; for this natural alligeance was intrinsic and primitive, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due: indeed the subject of a prince, to whom he owes alligeance, may entangle himself by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot by such a subjection devest the right of subjection and alligeance, that he first owed to his lawful prince (t).

It appears by *Bracton*, Lib. V. cap. 24. (u), that there were very many, that had been antiently *ad Fidem regis Angliae & Franciae*, especially before the loss of Normandy; such were the *comes marescallus* that usually lived in England, and *M. de Feynes manens in Francia*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties so, that they swore or professed *ligeance* or *lige homage* only to one; and the homage they performed to the other was not purely *lige homage*, but rather *feudal*, as shall be shewn more hereafter: and therefore when war happened between the two crowns, *remaneat per-*

[69] *sonalièr quilibet eorum cum eo, cui fecerat ligantiam, & faciat servitium debitum ei, cum quo non steterat in persona*, namely, the service due from the feud or fee he holds: but this did not always satisfy the prince, *cum quo non steterat in persona*, but their possessions were usually seized, and rarely or not without difficulty restored without a capitulation to that purpose between the two crowns. *Vide Claus. 15 H. 3. m. 21. pro Henrico de la Vagor, Claus. 20 H. 3. m. 1. pro Simone Montford, and Placita Parl. 18 E. 1. (x)*, the petition of the earl of Ewe in France for the castles of *Hastingley* and *Tikehull* is

(t) The case here put by our author is evidently meant of a private subject's swearing alligeance to a foreign prince, and has no relation to a national withdraw-

ing alligeance from a prince, who has abdicated the throne.

(u) *Traictat. 5. De Exceptionibus.*

(x) *Ryley's Plac. Parl. p. 20.*

answered,

answered, “ *Quandocunque placuerit domino regi Franciæ terras & tenementa hominibus istius regni restituere, quæ sua fuerunt, in potestate ipsius domini regio, quod ipse dominus rex Angliæ de castris & terris prædictis prædicto comiti reddendis faciet, quod de consilio suo viderit esse faciendum.*”

But sometimes it fell out, that the inconsiderateness of persons carried them upon presumptions of some advantages to make a ligeance to both princes ; and then the successes of either side rendered them within the penalty of the breach of alligence to the adverse party.

Peter Brian had the earldom of *Richmond* here in *England*, and held it of the crown of *England*, and the duchy of *Britany* in *France*, which was held of the crown of *France*, (tho *Brompton* tells us, that by an agreement between *Richard I.* and the king of *France* sub anno 1191. (y), the seigniory thereof was bestowed upon the king of *England*) he was an homager of the crown of *France*, and upon some agreement between him and the king of *England* touching a war with *France*, he came into *England*, and, as it seems, swore fealty to the crown of *England*; but afterwards he fell in again with the king of *France*, and betrayed the army of the king of *England*, and per inter-nuncios reddidit Anglæ regi homagium ; but he lost himself with both crowns : the king of *France* disposed of the duchy of *Britany* to his son, and the king of *England* gave the earldom of *Richmond* to *Peter de Sabaudia* ; tho upon an exchange he afterwards took it back, and restored it to a son of the former earl. *M. Paris* sub anno 1234. p. 406. and *Clauf. 19 H. 3. m. 17. dorſ.* where in a letter by [70] the king to the pope the whole story is related.

After this, *John de Breme* otherwise *Montford* descended from the above-mentioned *Peter*, falling in with king *Edward III.* after his assumption of the title of *France*, was restored to the duchy of *Britany* and earldom of *Richmond*; and *Clauf. 19 E. III. p. 1. m. 14. dorſ.* did his lige homage to king *Edward III.* as king of *France* in these words : “ *Monseigneur, jeo vous recognoisse droi-turell roy de France, et a vous, come a mon feignior liege et droi-turell roy de France, face mon homage pur le dit dutchy de Bretagne, quel jeo claime terier de vous, mon feignior, et deveigne vostre home lige de vie, et de membre, et de terrene honor, a vivre et morir countre tous gents.*” His son *John de Montford* falling

(y) *Vide Brompton*, p. 1196.

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back to the king of *France* lost the earldom of *Richmond* by judgment in parliament 7 R. 2. but entered *de recordo*. *Rot. Parl.* 14 R. 2. n. 14.

These difficulties befel these, that were *ad fidem utriusque regis*; they were sure to be losers on one side, and sometimes on both sides.

And thus far touching the oath of alligance or fealty.

II. The second express obligation of the subject to his prince is that of homage.

This, tho it be no oath, but a very solemn profession of duty, yet it hath always fealty performed with it, and after it; for homage draws with it fealty, which in case of simple homage done to a subject is with the same exceptions as the homage is; but in case of *homagium ligeum* it hath attending upon the performance thereof *fidelitas ligea*, or alligance.

The kinds of homage are three: 1. *Simple*, as that which is performed to a mere subject by virtue of his tenure. 2. *Homagium ligeum*. 3. *Homagium mixtum*.

1. The simple homage, which is performed barely by reason of tenure, is that which *Littleton* describes both in the words and ceremonies, *Lib. II cap. I. (z)*, wherein always there is an exception of the faith due to the king.

2. *Homagium ligeum*, which is thus: “*Jeo deveigne vostre [71] home de ceo jour en avant de vy et membre, et de terrene honor, et a vous ferra foyal et loyal, et foy a vous portera contre tous gents, qe viure point, ou morier;*” this is the form, that *Fleta* gives *Lib. III. ca. 16 (a)*.

The ceremony is the same, when done to the king, as when it is performed to a mesne lord, only *Rot. Parl.* 18 H. 6. n. 58. the ceremony of kissing the king was dispensed with by reason of the danger of contagion in time of plague.

And touching this homage these things are observable:

1. It differs from the oath of alligance, in that this is only by a profession; but alligance is by an oath, tho the oath of alligance also accompany it.

2. It differs in this, that, whereas all men above the age of twelve years are to take the oath of alligance, whether they hold land, or not; yet lige homage is not to be performed but by three sorts of persons: 1. Such as hold of the king by homage, which tho it be performed in respect of tenure, yet it is *homagium ligeum*, because per-

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formed to the sovereign, and without any exception of the homage due to inferior lords. 2. Such as are dukes, earls, or viscounts, or barons, tho they hold nothing of the king, yet at the coronation they perform a liege homage; the tenor whereof runs thus: “ I become your liege man of life and limb, and of earthly worship, and faith and truth I shall bear unto you to live and die against all manner of folk: so God me help!” and then he toucheth the crown, and then toucheth the ground; *nota*, it refers not to any lands. 3. By prelates or bishops; and this is not only at the coronation of the king, but after their election, and before the restitution of their temporalities. *Vide Statute 25 H. 8. cap. 20.*

Antiently the clergymen quarreled at the performance of homage to the prince; but by the constitutions of *Clarendon* set down by *Mather Paris*, p. 101. they were bound to perform it, and it hath been hitherto practised; only to gratify them in something antiently it was indulged in this manner, *viz.* “ *Faciet electus homagium & fidelitatem regi, sicut ligio domino suo, de vita, & membris, & de honore terreno, salvo ordine suo, priusquam consecretur;*” and, [72] tho I do not find this *salvo ordine* inserted in after-times, yet there hath been a temperament added to that homage performed by clergymen, which it seems satisfied their scruple, their homage running thus: “ *I do you homage, and faith, and truth bear unto you, our sovereign lord, and to your heirs kings of England, and I shall do, and truly acknowledge the service of the lands, which I claim to hold of you in the right of the church, as God me help.*”

And this is fealty, as well as homage, for it is accompanied with an oath, tho it hath the solemnity of genuflexion, and kissing the king’s cheek.

3. The agreements and differences between that homage, that is simply feudal, or by reason of tenure only, and this homage, that is *homagium ligatum*, are these: 1. Because the homage is not to be done by any, but those that hold by that service, or by the nobility, or clergy, as before: yet when done to the king, it becomes *homagium ligatum* in respect of the person to whom it is performed. 2. If it be homage done to the king, it is *homagium ligatum*, and hath no exception of homage due to others. 3. But principally the difference is in the effect of it, which is excellently described by *Terrien* in his Comment upon the *Custumer of Normandy*, Lib. III. cap. 1. Feudal homage, that is simply such, binds only *ratione feodi*; therefore if the homager

homager alien, or deliver to his lord his fief, or fee, he is discharged of the obligation ; but lige homage, tho it may be performed by reason of the fee in its kind or species, yet it principally binds the person ; and tho the fief itself be aliened, or transferred to another, yet the obligation of lige homage continues.

3. There are certain homages, that are mixt, and partly lige, and partly not ; and they are of two kinds : 1. When the homage is performed to a prince, that is sovereign in relation to his subjects, yet owes a subjection to some other prince ; this was the case of the prince of *Wales*, and the king of *Scots* before mentioned, the homage, that they performed to the king of *England*, was simply lige homage, as we may read before, and particularly in *Walsingham's Ypodigma Newfricæ*

[73] *sub anno 1291. (b)*, where the tenor of the homage of *John de Baliol* king of *Scots* is entred in *hæc verba* : “ *Domine Edvarde rex Angliæ, superior domine regni Scotiæ, ego Johannes Baliol rex Sco- tiæ recognosco me hominem vestrum ligatum de toto regno Scotiæ, & om- nibus pertinentiis, & hiis, quæ ad hoc spectant; quod regnum meum teneo & de jure debeo & clamito tenere hæreditariæ de vobis & hæredibus vestris regibus Angliæ, de vitâ & de membris, & de terreno honore contra omnes homines, qui possunt vivere & mori.* ”

I mention this homage of the king of *Scots* not to revive the antient controversy touching the subordination of that kingdom to this, for that difference hath been long settled and at peace ; but only to apply my instances of the various sorts of homages performed by sovereign princes.

But the homage, that was performed by their subjects to them, was partly lige homage, and partly not ; it was lige homage as to between the king of *Scots* and them, and as to all persons in the world, except the king of *England* ; for the king of *Scots* and prince of *Wales* had the rights of sovereignty *jura imperii* as in relation to their subjects and all others, but the king of *England*.

But in relation to the king of *England*, the homage performed to the prince of *Wales* or king of *Scots* was not lige homage ; for there was an exception either expressed or implied at least *salvâ fide domini regis Angliæ*, as appears plainly above.

2. Another instance of a mixt homage is, when a sovereign prince hath a vassalage, or possession in another absolute prince's dominion : this was the case of the king of *England*, in relation to the lordships

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and feignory he had in *France*, as *Aquitaine*, *Anjou*, and *Picardy*, &c. which were all held of the crown of *France*: these descended to king *Edward III.* the king of *France* required lige homage from the king of *England* for these territories; the king of *England*, as king of *England*, had no dependence on *France*, and therefore for the more caution performed to the king of *France* for the dutchy of *Aquitaine* and other his possessions in *France* a general homage by [74] these words, “*Nous entromys in l'homage de roy de France per ainsi, come nous et nous predecessors dues de Guyen estoient jades en terent en l'homage des royes de France pur temps esleant;*” and altho afterwards a settled form of homage was prescribed in this case (c), yet most evident it is, that it was not *homagium ligeum*, but only a *feudal homage* relative to those territories of the crown of *France*, but but not at all with any relation to the person or crown of the king of *England*.

For the king of *England* had a double capacity, one as an absolute prince, that owed no subjection to the crown of *France*; nor to any other king, or state in the world; in this capacity he neither did nor could do homage to the king of *France*; he had another capacity, as duke of *Aquitaine*, and in that capacity he owed a *feudal*, but not *personal* subjection to the crown of *France*; and in this latter capacity only, and as a different person from himself, as king of *England*, he did the homage, which was in truth no *lige homage*, but a bare *feudal homage*, which I rather mention to rectify the mistakes of those that call it a *lige* homage.

But by the way I must observe, this feudal homage, as duke of *Aquitaine*, lasted not long; for in 14 E. 3 the king of *England* assumed the title of king of *France* together with the arms of *France* by hereditary descent, which style his successors have ever since used.

And indeed the name of *lige* homage from him, that was king of *England*, to the king of *France*, tho purely in the capacity of duke of *Aquitaine*, sounded so ill, that when a peace was in treaty between the king of *France* and *Richard II.* viz. Rot. Parl. 17 R. 2 n. 16. the entry is made, “*Fait a remember qe le roy, seigneurs, chivalers, et justices assenterent en cest parliament a le pees, purens qe nostre dit seigneur le roy ne face hommage lige, et sauant tous dits le liberty de*

(c) *Vide Pat. 5 E. 3. part 1. m. 17.*

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"*la person nostre seigneur le roy, et de son royalme de Angleterre et de ses liges du dit royalme,*" and with power to resort to the title of the crown of *France*, in case of breach of league by the king of *France*: this is farther amplified by the speech made openly by the speaker of the house of commons. *Ibid. n. 17.* The homage [75] here meant was with relation to the duchy of *Aquitaine*, which upon this treaty was to be delivered to the king of *England*.

And thus much touching these two securities of the subjects allegiance to the king of *England*, wherein I have been the larger, because many things occur in this business, that give some light to antiquity, and do not so commonly occur, and because the great brand of high treason is, that it is a violation or breach of that sacred bond from the subject to his king, commonly called alligance, for the security whereof this oath of alligance and lige homage were instituted, and effectually expounds the obligation, and duty of that alligance, that is due from the subject to the king.

I shall now only mention those two eminent oaths of supremacy, and obedience, tho there were besides them other temporary oaths relating to the crown, as that of 25 *H. 8. cap. 22.* 26 *H. 8. cap. 2.* 23 *H. 8 cap. 7.* 35 *H. 8. cap. 1.*

The supremacy of the crown of *England* in matters ecclesiastical is a most unquestionable right of the crown of *England*, as might be shewn by records of unquestionable truth and authority, but this is not the business of this place; yet nevertheless the pope made great usurpations and incroachments upon the right of the crown herein.

King *Henry VIII.* in the twenty-fifth year of his reign having pared off those incroachments in a good measure by the statute of 25 *H. 8. cap. 19, 20, 21.* in the twenty-sixth year of his reign the supremacy in matters ecclesiastical is rejoined and restored to the crown by the statute of 26 *H. 8. cap 1.*

The papal incroachments upon the king's sovereignty in causes and over persons ecclesiastical, yea even in matters civil under that loose pretense of *in ordine ad spiritualia*, had obtained a great strength, and long continuance, notwithstanding the security the crown had by the oaths of fealty and alligance; so that there was a necessity to univet those usurpations by substituting by authority of parliament a recognition by oath of the king's supremacy as well in clauses ecclesiastical as civil.

And

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And therefore after those revolutions, that happened in the life, and on the death of *Henry VIII.* *Edward VI.* and queen *Mary*, queen *Elizabeth* coming to the crown, the oath of supremacy was enacted by the statute of 1 *Eliz. cap. 1.* for the better securing of the supreme authority of the crown of *England* as well in masters ecclesiastical as temporal; which I shall not here repeat, but reserve the same, and what is proper to be said touching it, to a particular chapter hereafter (*d*).

Afterwards the dangerous practices of popish recusants gave the occasions of enacting of the oath of obedience by the statute of 3 *Jac. cap. 4.* which I shall likewise refer to its proper place.

And thus far touching alligance, and the securities of the same by the oath of alligance, and the profession of lige homage.

See 4. Blackf. Com. ch. vi. & Post. Discourse on High Treason. p. 183 to 251, 397, 398, & 1 Hawk. P. C. c. xvii. of h. treason, p. 33 to 46.

CHAP. XI.

Concerning treasons at the Common law, and their uncertainty.

HAVING shewn in the former chapter the kinds and bonds of fidelity and alligance from the subject to the king, I come to consider of those crimes, that in a special manner and signally violate that alligance, namely high treason.

At Common law the crime of high treason had some kinds of limits and bounds to it.

In the time of *Henry II.* *Glanvil*, who then wrote *Lib. IV. cap. 1 & 7.* tells us of four kinds of *crimina læsa* [77] *majestatis*, viz. *de morte regis*, *de seditione regni*, *de seditione exercitus regis*, and the counterfeiting of the great seal; for as to the counterfeiting of money, that came under the title of *Crimen falsi*, and the punishment thereof antiently was various; but of that particular hereafter.

Basset, that wrote in the time of *Henry III.* *Lib. III. cap. 3.* “ *Siquis ausu temerario machinatus sit in mortem domini regis; vel ali-*

(d) *Vide postea cap. 25.*

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“ quid egerit, vel agi procuraverit ad seditionem (a) domini regis, vel
 “ exercitus sui; vel procurantibus auxilium & consilium praebuerit, vel
 “ consensum, licet id, quod in voluntate habuerit, non perduxerit ad
 “ effectum;” to which he adds counterfeiting of the seal and money;
 which, tho they come under *crimen falsi*, yet are reckoned by him
 among the *crimina lese maiestatis*: tho in these old authors treason
 is sometimes expressed by the name of *sedition*, yet that word is too
 general and comprehensive of other offenses not capital, as well as
 of treason; and therefore a charge of sedition against the king, or of
 exciting sedition, or of speaking, writing, or doing any thing *sedition-*
ously, doth not amount to a charge of treason; and therefore it was,
 that in the case of *Selden* and others, *Trin. 5 Car. B. R.* (b), when
 upon an *habeas corpus* the parties were returned committed by the

[78] *privy council by the king's command for stirring up sedition*
 against the king, the prisoners were bailed in the king's
 court, because it amounted not to a charge of treason, for sedition in
 a true legal signification doth not import treason.

Fleta, who wrote in the time of *Edward I.* agrees almost *verba-*
tim with *Bracton*, viz. *Lib. I. cap. 20, 21 (c)*.

Britton, who made his book in the time also of king *Edward I.*
 reckons up treasons much in the same manner, yet makes some ad-
 ditions, *cap. 8. de treason*; “ *Grand treason est a compasser nostre mort,*
 “ *ou diſchiriter nous de nostre royalme, ou de faufer nostre seal, ou de*
 “ *countraſfaire nostre monoye, ou de la retoundre.*”

(a) In the case of Mr. *Selden* this is sup-
 posed to be the true reading, but in most
 of the MSS. of *Bracton* the word in this
 place is *ſeditionem*, altho in other places
 of the same chapter the word *ſeditio* is
 used; *Fleta* makes frequent use of the
 word *Sedulio*, *Lib. I. cap. 20. § 1 cap. 21.*
 § 2, 3. (the last of which places seems
 to be a direct transcript from *Bracton*) tho
 the word *ſeditio* is once used by him, *dicio*
capite, § 8. and *Bracton* afterwards in this
 same chapter styles a traitor *ſeditio*.

Hengham, cap. 2. and Glanv. 4. Lib. I.
cap. 2. both of them place *ſeditionem* in the
 rank of treasons, and so it was esteemed
 by the Civil law. *Div. Lib. XI VIII. tit.*
4. ad leg. Jul. Maj. ſitis, l. 1. m. 19. De
panis, l. 38. § 2. *Seditio* continued to be
 the technical word in legal proceedings (as
 will appear from several records hereafter
 quoted) until the terms *proditio* & *prodi-*

tori prevailed in its room, which last word
 must now be necessarily used in every in-
 diement of treason. *3 Co. Inf. 4. 12, 15.*

(b) *Mich. 5 Car. I. Vide Rushworth's His-*
torical Collections, Vol. I. p. 679. Appendix,
p. 18, &c. Selden Opera, Vol. VI. p. 1988.
 The court was content, that they should
 be bailed, but said, that they ought to find
 sureties also for their good behaviour: they
 had their sureties ready for the bail, but
 they were remanded to the *Tower*, because
 they would not find sureties for the good
 behaviour. *Selden* was not bailed till *May*
1631. and not discharged from his bail till
January 1634. Vindicta Maris Clav. Selden
Opera, Vol. IV. p. 1427, &c.

(c) He does not rank the counterfeiting
 of the seal or of the coin among the *cri-*
mina lese maiestatis (as *Bracton* does), but
 among the *crimina falsi*; *Lib. I. cap. 22.*

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And cap. 22. de appelles : “*Sont ascunes felonies, que touchent nostre fuyt, et poient estre juyys par nous, sicomme de vers nos mortels enemies, de nostre seal, de nostre corone, et de nostre monoye fause.*”

Again ; “*En primes, c'est a dire, de appells de felonies, que poient estre faitz par nous, et nemye pour nous, sicomme de trefon, et de compassement purveu vers nostre personne pour nous mettre a mort, ou nostre compayne, ou nostre pere, ou nostre mere, ou nous enfauntee, ou nans disperiter de nostre roialme, ou de trahir nostre hoste, tout ne soit tiel compassement mys en effect.*”

And in the latter end of the same chapter, “*Et de fausyn de nostre seal, & de nostre monoye, purra lensieur appells pour nous en mesme la manere, et ausi del purgiser de nostre compayne, ou de nous filles, ou des norices de nos enfauntee : (d) En queux cascs soit le jugeement, de estre treyn, et pendu, &c.*” By these various expressions of [79] Britton it appears, that the crime of high treason was very uncertain ; sometimes styled under the name of felony, sometimes had the punishment of petit treason applied to the crime of high treason, and some crimes mentioned, as treasons, which were not so taken by Bracton, or Fleta ; and indeed in the farther pursuit of this argument we shall find, that at common law there was a great latitude used in raising of offenses into the crime and punishment of treason, by way of interpretation and arbitrary construction, which brought in great inconvenience and uncertainty.

In the parliament of 33 E. I. now printed (e), which is likewise entered P. 33 E. 1 Rot. 22. North't. coram rege : *Nicholaus de Segrave* was impeached (f) *de eo, quod cum dominus rex nunc in ultimâ guerra sub Scotia inter hostes & inimicos suos existisset, & idem Nicholaus de Segrave homo ligatus de ipso domino rege per hominem*

(d) According to the *Mirror of Justice*, p. 21, 22. high treason is committed, 1. *Per ceux, que occident le roy, ou compassent de faire.* 2. *Per ceux, que luy disperterent le roialme, per [ceux que] trahissent un hoste, ou compassent de le faire.* 3. *Per ceux appotterer, que spargissent le femme le roy, le file le roy eignesse legitime, avant cea que elle soit mary, ou la garde le roy, ou la aurice le ans le heire le roy.*—These are the only offenses, which that treatise calls *Crisps de Majesté*. Counterfeiting of the king's seal or money is ranked under *Faysonery*, p. 29. And every species of petit treason is styled *Treason*, p. 39. as it is also by Britton, cap. 8.

It is one of the articles against Roger Mortimer, Rot. Parl. 4 E. 3 n. 1. 28 E. 3 n. 3. that he compassed to destroy les narrie le roy. If a private lord was injured in this manner, it was antiently petit treason : “*Traditores autem, qui dominum dominante intersecerint, vel qui cum uxoribus dominorum suis fuerint, vel filiis, vel auariciis dominorum concubuerint,*” &c. Fleta, Lib. I. cap. 37. § 4. “*On disparaige ma file, ou ma chambre, ou ma femme, ou la norrice, de ma haire, ou le ault, &c.*” *Mirror de Justice*, p. 31. Vide Britton, cap. 22. (70) (e) In Ryley's *Placita Parliamentaria*, p. 266.

(f) *Per Nicholatum de Warwick, qui sequitur pro domino rege.*

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"gium & fidelitatem in eadem guerrâ in exercitu & auxilio ipsius commorans esset; idem Nicholaus de Segraue motu proprio, malitiosè, & absque causâ contentionem & discordiam versus Johannem de Crumbwell in eodem exercitu similiter in auxilium regis existentem movebat," laying great iniquities to his charge; that Crumbwell offered to defend himself against these imputations, as the king's court should award: *Et ad hoc fidem suam ei dedit; et post ejusdem fidelitationem praedictus Nicholaus elongando se & suos, & extrahendo praedictum Johannem & suos ab exercitu & auxilio ipsius domini regis, quantum in ipso Nicholao fuit, sundem dominum regem inter inimicos suos periculo hostium suorum relinquendo sprevit, & praedictum Johannem ad se defendendum incuria regis Franciae adjornavit, & certum diem ei dedit; et sic, quantum in eo fuit, submittens & subjiciens dominium regis & regni Angliae subjectioni domini regis Franciae;* and that in pursuance thereof contrary to the king's prohibition he took his

[80] journey towards France; and that he did this "ne quiteret & malitiosè in persona domini regis periculum, curia sua contemptum, coronæ & dignitatis sua regie læsionem & excommunicationem manifestam, & contra ligantiam, homagium, juramentum, & fidelitatem, quibus ipse domino regi tenebatur." Segraue confessed the offense. The lords in parliament are charged by the king upon their allegiance to give advice, what punishment was to be inflicted; "Qui omnes habito super hoc diligenter tractatu & advisamento, consideratis & intellectis omnibus in dicto facto contentis & per praedictum Nicholau plenè & expressè cognitis, dicunt, quod crimen hujusmodi meretur pœnam amissionis vitæ, &c." but he was after pardoned.

Which judgment seems to import no less, than the crime of high treason, tho the whole judgement be not declared at large but with an &c. "

Accroaching of royal power was a usual charge of high treason antiently, tho a very uncertain charge, that no man could well tell what it was, nor what defense to make to it.

The great charge against the Spencers about the 1 E. 2. was, that they did accroach royal power, whereof several instances are given (g).

The great charge against Roger Mortimer in the parliament of 4 E. 3. next to that of the procurement of king Edward II's death, was accroaching of royal power, whereof several instances are given;

(g) *Vide Knights, p. 2545, 2547. Edit. Twysden.*

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but he had judgment by the lords in parliament to be drawn and hanged, upon that article only, that concerned the death of king Edward II. *Vide infra cap. 14.*

*Trin. 21 E. 3. Rot. 23. rex coram rege. John Gerberge, Knt. indicted "Quod ipse simul cum aliis in campo villa de Royston in altâ regiâ stratâ," rode armed with his sword drawn in his hand modo guerrino, and assaulted and took William de Botelisford, and detained him, till he paid 90l. &c. and took away his horse, "usurpando sibi infra regnum regis regiam potestatem ipso domino rege in partibus exteriis existente, contra sui ligeantiam, & regis & coronæ sue præjudicium, & seditionem manifestam;" he prayed his clergy, [81] but was ousted of it, *Quia privilegium clericale in hujusmodi casu seditionis secundum legem & consuetudinem regni hactenus obtentas & usitatas non est allocandum (h):* but yet he refusing to plead was not convicted, as in case of treason, but was put to penance, *ad paenitentiam suam;* two of his companions being convicted by verdict, had judgment, *quod distrahantur & suspendantur.**

This judgment it seems troubled the commons in parliament, who thought, that the accroaching of royal power was somewhat too general a charge of treason before the ordinary courts of justice, tho it had been used in charges of treason in parliament; and therefore in the parliament following held *Craftino Hilarii 21 E. 3. n. 15.* there is a petition in parliament in these words: *Item prie le commen, qe come ascuns des justices en place devant eux ore de novel ont adjuges pur treason accrochment de royal poer, pry le dit commen, que le point soit desclare en ceo parlement, en quele cas ilz accrochent royal poer, per qui les seigneurs perdent lour profit de le forfeiture de lour tenuants, et les arreynes beneficie de seint esglise.*

Ro'. En les cas, ou tel judgments sont rendus, sont les points des tieux treasons et accrochments declares per mesmes les judgments.

In 22 Aff. 49. (i), it appears, that *John at Hill* was indicted, and attaint of high treason for the death of *Adam de Walton nuntii domini regis missi in mandatum ejus exequendum.*

And in the year before, *viz. 21 E. 3. 23.* it seems admitted, that an appeal of treason lies for the killing done of malice prepense, that was sent in aid of the king in his wars with certain men of arms.

(h) For the same reason clergy was refused in Thorpe's case, T. 21 E. 3. Rot. 23. *Rex. de quo vide postea.* (i) *E. Treason 14.*

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King *Edward II.* being deposed, and committed prisoner to *Barclay* castle under the custody of *John Matravers* and *Thomas Gurney*, was there by the procurement of *Roger Mortimer* barbarously murdered; for which *Mortimer* and *Gurney* were attainted of treason by judgment of the lords in parliament. 4 E. 3. n. 1, 5. (k).

[82] *Matravers* was suspected to be guilty, but yet he played another game, for tho he knew of the death of *Edward II.* yet he informed *Edmund* earl of *Kent*, half-brother to *Edward II.* that he was living; the earl therefore with many others raised a force for his deliverance, but prevailed not, but was for that fact attainted of treason, anno 3 E. 3. which attainder was afterwards in the parliament 28 E. 3. reversed, and the grand child of the earl of *Kent* restored (l): *John Matravers*, who it seems had animated the insurrection of the earl of *Kent*, tho he fled into *Germany*, yet by judgment of the lords in parliament 4 E. 3 n. 3. was attainted of treason for the death of the earl of *Kent*: the words of the records are;

“ Tres-tous les peres, counts, et barons assambles a cest parlement a
“ Westminster si ont examine estraitement, et sur ce sont assentus et ac-
“ cordes, qe John Matravers si est culpable de la mort Esmon count de
“ Kent le uncle nostre seigneur le roy qe ore est, come celui qe principal-
“ ment, trayeronſment et fauſement la mort le dit counte compassa iſſint,
“ qe la ou le dit John ſavoir la mort le roy Edward, ne pur quant le
“ dit John par enginous manner et par ſes fauſſes et mauveyſe ſubtilties
“ ſift le dit counte intendre la vye le roy, le quel fauſſe compaſſement fuſt
“ cauſe de la mort le dit counte et de tout le mal qe ſ' enſuift, par quoi
“ les ſus-dits peres de la tre et jugges du parlement ajuguent et agardent,
“ que le dit John ſoit treine, pendus, et decolle, come treitre, queu part,
“ qil ſoit eſtre trouue.”

Upon this judgment *Matravers* brought a petition of reversal. Rot. Parl. 21 E. 3. n. 65. dorf. but nothing was done upon it; but Rot. Parl. 25 E. 3. p. 2. n. 54, 55. he was restored by act of parliament.

By these, and the like instances, that might be given, it appears, how uncertain and arbitrary the crime of treason was before the statute of 25 E. 3. whereby it came to pass, that almost every offense,

(k) *Vide Rot. Parl. 28 E. 3. n. 8.* when the judgment against *Mortimer* was re-

(l) That attainder was reversed long before, viz. 4 E. 3. *Vide Rot. Parl. 4 E.*

n. 11, 12. upon the petition of *Edmund* his eldest son, and *Margaret* countess dowager of *Kent*; and *Edmund* the son was restored.

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that was, or seem'd to be a breach of the faith and alligence due to the king, was by construction and consequence and interpretation raised into the offense of high treason.

And we need no greater instance of this multiplication [83] of constructive treasons, than the troublesome reign of king *Richard II.* which, tho it were after the limitation of treasons by the statute of 25 E. 3. yet things were so carried by factions and parties in this king's reign, that this statute was little observed; but as this, or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party, that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute of 25 E. 3. had not been made or in force. And tho most of those judgments and declarations were made in parliament (*); sometimes by the king, lords, and commons; sometimes by the lords, and afterwards affirmed and enacted, as laws; sometimes by plenipotentiary power committed by acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty, that happened from the same, was exceedingly pernicious to the king and his kingdom.

I shall give but some instances. *Rot. Parl. 3. R. 2. n. 18.* *John Imperial*, a public minister, came into the kingdom by the safe-conduct of the king, and he was here murdered (m); and an indictment taken by the coroner upon the view of his body, “*Quel casse examine et dispute entre les seigneurs et commons, et puis monstre au roy en plein parlement, estoit illoques devant nostre dit seigneur le roy declare, determine, et assentus, qe tiel fait et coupe est treason, et crime de royal majesty blemby, en quel casse y ne doet allouer a nulli de enjoyer privi- lege de clergy (n).*”

This declaration, it is true, was made and grafted upon the clause in the latter end of the statute of 25 E. 3. touching declaring of treasons by parliament.

In the parliament of 10 R. 2. there was a large commiffion (o) granted by the king upon the importunity of certain great lords, and of the commons in parliament, to the archbishop [84.]

(*) This was the reaon why the statute of 25 E. 3. was not followed, because that statute was not thought to limit declarations in parliament.

(m) *Holin. Cbrn.* p. 422. 60. b.

(n.) See 3 Co. Insti. 8.

(o) See this commiffion 10 R. 2. cap. 1.

and *State Trials*, Vol. I. p. 3.

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of Canterbury and others for the reformation of many things supposed to be amiss in the government ; which commission was thought to be prejudicial to the king's prerogative. *Vide Rot. Parl. 10 R. 2. n. 34. Rot. Parl. 21 R. 2. n. 11.*

After this, *viz.* 25 Aug. 11 R. 2. the king called together the two chief justices, and divers others of the judges, and propounded divers questions touching the proceeding in that parliament, and the obtaining of that commission ; and they gave many liberal answers, and among the rest, “ *Qualem penam merentur, qui compulerunt five addarunt regem ad consentiendum confessioni dictorum statuti, ordinacionis, & commissionis?* *Ad quam questionem unanimiter responderunt, quod sunt, ut proditores, merito puniendi : Item qualiter sunt illi puniendi, qui impidererunt regem, quo minus poterat exercere, que ad regalia & prærogativam suam pertinuerunt?* *Unanimiter etiam responderunt, quod sunt ut proditores, etiam puniendi,*” with divers other questions, and answers to the like purpose (*p.*)

This extravagant, as well as extrajudicial declaration of treason by these judges, gave presently an universal offense to the kingdom ; for presently it bred a great insecurity to all persons, and the next parliament *craftio purificationis* 11 R. 2. there were divers appeals of treasons by certain lords appellors, wherein many were convicted of high treason under general words of *accroaching royal power, subverting the realm, &c.* and among the rest those very judges, that had thus liberally and arbitrarily expounded treason in answer to the king's questions, were for that very cause adjudged guilty of high treason, and had judgment to be hanged, drawn, and quartered, tho the execution was spared (*q.*) ; and they having led the way by an arbitrary construction of treason not within the statute, they fell under the same fate by the like arbitrary construction of the crime of treason.

Neither did it rest here, for the tide turned, and in *Rot. Parl. 21 R. 2. n. 12, 13.* the commission before-mentioned, and the whole parliament of 11 R. 2. is repealed, and a new appeal of treason against the duke of Gloucester, earl of Arundel, and the commissioners in the former commission, and the procurers thereof under that common style of *accroaching royal power*, whereupon divers of them were condemned as traitors : and *n. 18.* there were

(*p.*) See the questions and answers, *State Trials*, Vol. I. p. 8. except *Tregelles*, who was executed according to the judgment. See *State Trials*, Vol. I. p. 13, 14.
(*q.*) They were all banished to *Ireland*.

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Four points of treason farther declared, *viz.* “ *Cheſcun qe compaffe, et*
“ *purpoſe la mort le roy, ou de lui depofer, ou de ſuſtrendre ſon homage*
“ *liege, ou celuy, qe leuy le people, et chivache encontre le roy a faire*
“ *guerre deins ſon realme, et de ceo ſoit dumment attaint, et adjuſſe en*
“ *parlement, ſoit adjuſſer come traytor de haut treason encontre la*
“ *corone, et forfeſit de lui, et de ſes heyres, quecunqueſ touts ſes terres,*
“ *ieuenments, et poſſeffions, et libertys, et touts autres inheritements, queux*
“ *il ad, ou aſcun autre a ſon oeps, ou avoit le jour de treason perpetres,*
“ *ſi bien en fee tayl, come de fee ſimple, ou roy.*

These four points of treason seem to be included within the statute of 25 E. 3. as to the matter of them, as shall be hereafter shewed; but with these differences, *viz.* 1. The forfeiture is extended farther than it was formerly, namely to the forfeiture of estates-tail and uses. 2. Whereas the antient way of proceeding against commoners was by indictment, and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 E. 3. required an overt-act to be laid in the indictment, and proved in evidence, this act hath no ſuch provision; which left a great latitude, and uncertainty in point of treason, and without any open evidence, that could fall under human cognizance, ſubjected men to the great punishment of treason for their very thoughts, which without an overt-act to manifest them are not triable but by God alone.

These were the unhappy effects of the breaking of this great boundary of treason, and letting in of constructive treasons, which by various vicissitudes and revolutions mischieved all parties first or last, and left a great unquietness, and unsettledness in the minds of people, and was one of the occasions of the unhappiness of that king. [86]

Henry IV. usurping the crown, and the people being ſufficiently ſensible of the great mischiefs they were brought in by these constructive treasons, and the great insecurity thereby, *Rot. Parl. 1 H. 4. n. 70.* the parliament of 21 R. 2. is entirely repealed, that of 11 R. 2. entirely revived; and it was enacted (*r*), that a parliamentary authority be not for the future lodged in a committee of particular persons, as it was done 21 R. 2. *Et auxint meſme noſtre ſeigneur le roy de ſon propre mortif reherceant, qe come in le dit par-*

(r) See 1 H. 4. cap. 3, 4 & 5.

lement

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“ Lement tenuz l'an 21. y fueront ordenees per estatute plusieurs paines
“ de treason, si qe y ne avoit aucun home, qe sauoit, come il se deust
“ savoir, de faire, parler, ou dire pur doabt des tiels paines, dist, qe
“ sa volonte est tout outrement, qe en nul temps avener aucun trayson
“ soit adjuges autrement qil ne frust ordeignez par statute en temps de
“ son noble aiel le roy E. le 3. qe dictu assoyl; dont les dits seigneurs et
“ comens furent tres grandement rejoyces, et mult humblement ent re-
“ mercierent nostre dit seigneur le roy (f).”

Now altho the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom, or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict; yet by these instances, and more of this kind, that might be given, it appears, 1. How necessary it was, that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of 25 E. 3. was, in order to that end. 2. How dangerous it is to depart from the letter of that statute, and to multiply and inhanse crimes into treason by ambiguous and general words, as *accoaching of royal power, subverting of fundamental laws*, and the like; and 3. How dangerous it is by construction and analogy to make treafons, where the letter of

[87] the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men (t).

See 4. Bla Com. c. vi. and Post. Discourse on High Treason, page 183 to 251.

C H A P. XII:

Touching the statute of 25 E. 3. and the high treasons therein declared.

A Parliament was held on *Wednesday* on the feast of St. *Hill.* 25 E. 3. at which parliament the statute declaring the points of treason was made. The petition of the commons, upon which it

(f) See 1 H. 4. cap. 10.

(t) This reasoning of our author is equal.

ly strong against constructive interpretations of *compassing the death of the king.*

was

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was made, is *Rec. Parl.* 25 E. 3. p. 2. n. 17. in these words: " Item
" come les justices nostre seigneur le roy affignes en diverses countees
" ajuggent les gents, qe sount empêches devant eux, come treitors par
" divers causes disconus a la comen estre treison, qe plese a nostre
" seigneur le roy par son counsel, & par les graunts & sages de la
" terre declarer les points de treison en cest present parlement.

" Ro'. Quant a la petition touchant treison nostre seigneur le
" roy ad fait declarer les articles de ycele en manner qe ensuit: cest
" assavoir, en case quant home face compaser ou ymaginer la mort
" nostre seigneur le roy, ou madame sa compaigne, ou de lour fitz
" primer & heir; ou si home violast la compaigne le roi, & la eisne
" fille le roy nient marié, & la compaigne a leisne fitz & heire du
" roi; & si home leve de guerre contre nostre seigneur le roy en
" son royalme; ou soit adhèrent as enemies nostre seigneur le roy
" en le royalme, donant a eux eide, & confort en son royalme ou par
" aillours, & de ceo provablement soit atteint de overt fait par gents
" de lour condicion: Et si home contreface le grant seale [88]
" le roy, ou sa monacie, & si home apporte fausse monoie
" en cest royalme contrefait a la monoie dengleterre, si come la mo-
" noie appellee *Luffeburgh*, ou autre semblable a la dite monoie
" dengleterre, sachant la monoie estre fausse, pur marchander ou
" paient faire en deceit nostre seigneur le roy & de son people:
" Et si home tuast chancellor, treasurer, ou justice nostre seigneur le
" roi del un baunk, ou del autre, justice en eir, des assisez & de touz
" auters justices affignez a oyer & terminer, esteantz en lour places
" enfesant lour office. Et fait a entendre qe en les cas es susnomes
" doit estre ajuggee treisance, qe estent a nostre seigneur le roi & a
" sa royale majesté, & de tels maneres de treison la forfeiture des
" escheets appertient a nostre seigneur le roy, sibien des terres, &
" tenementz tenuz des auters, come de lui mesme: ouesque ceo il y
" ad autre manere de treison, cest assavoir, quant un servant tue son
" mestre, une feme, qe tue son baron, quant home secular ou de
" religion tue son prelate, a qil doit foi & obedience, & tel manere
" de treison doun forfeiture des escheets a chescun seigneur de son
" fee propre; & pur ceo qe plusfours autres cas de semblable treison
" purront eschaier en temps avenir, queux home ne purra penser ne
" declarer en present, assentu est qe qui autre cas suppose treison,
" qe nest especielz peramont, aviegne de novel deuant ascuns ju-
" tices, demoerge la justice sanz aler a juggement de treison, tant-

que

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“ que per devant nostre seigneur le royst & son parlement soit le esme
“ monstre, & declare, le quel ceo doit estre ajugge treason, ou aut’
“ felonie ; & si par cas aucun home de cest royalme chivache armee
“ descovert, ou secretement ad gentz armez contre aucun autre pur
“ lui ruer ou desrober, ou pour lui prendre & retener tanque il face
“ fyn ou raunceon pur sa deliverance avoir, nest pas lentent du royst
“ & du son conseil, qe en tel cas soit ajugge treason, einz soit ajugge
“ felonie, ou trespass solonc la ley de la terre auncienement usee, &
“ solonc ceo que le cas demand : Et si en tel cas, ou autre sem-
[89] “ blable devant ces heures aucun justice eit ajugge treason, &
“ par ycelle cause les terres & tenementz devenuz en la maine
“ nostre seigneur le roi come forfaitz eient les chefes feignours de fee
“ lour escheets des tenementz de eux tenuz, le quel qe les tenementz
“ soient en la maine le roi ou en main dauters par doun, ou en autre
“ manere : savant toutes foits a nostre seigneur le roi lan, & le waſt,
“ & auters forfeitures des chateix, qe a lui attient en les cas susno-
“ mez, & qe briefs de *scire facias* vers les terre-tenants soient grantez
“ en tel cas sanz autre original & sanz alouer la protection nostre
“ seigneur le roi en la dite fuyte ; & de les terres, qe sont in la maine
“ le roi, soient grantes briefs as viscontz des countees la, ou les terres
“ ferront, de ouster la maine sanz autre delaie.”

The statute itself is drawn up upon this petition and answer, and differs nothing in substance from the answer to the petition upon the parliament-roll : the statute itself runs in these words : “ *Item,*
“ whereas divers opinions have been before this time in what case
“ treason shall be said, and in what not, the king at the request of
“ the lords and of the commons hath made a declaration in the
“ manner, as hereafter followeth ; that is to say, when a man doth
“ compass or imagine the death of our lord the king, or our lady his
“ queen, or of their eldest son and heir ; or if a man do violate the
“ king’s companion, or the king’s eldest daughter unmarried, or the
“ wife of the king’s eldest son and heir ; or if a man do levy war
“ against our lord the king in his real, or be adherent to the king’s
“ enemies in his realm, giving to them aid and comfort in the realm
“ or elsewhere, and thereof be provably (*a*) attainted of open deed
“ by the people of their condition ; and if a man counterfeit the
“ king’s great or privy seal, or his money ; and if a man bring false

(a) See *3 Co. Insti.* p. 120.

“ money

" money into this realm counterfeit to the money of *England*, as
 " the money called *Lufburg*, or other like to the said money of
 " *England*, knowing the money to be false, to merchandize or make
 " payment in deceit of our lord the king and of his people: and if a
 " man slay the chancellor, treasurer, or the king's justices of the one
 " bench or the other, justices in eyre, or justices of assize, and all
 " other justices assigned to hear and determine, being in [90]
 " their places doing their offices. And it is to be under-
 " stood, that in the cases above rehearsed that ought to be judged
 " treason, which extends to our lord the king and his royal majesty,
 " and of such treason the forfeiture of the escheats pertaineth to our
 " lord the king, as well of the lands and tenements holden of others,
 " as of himself: and moreover there is another manner of treason,
 " that is to say, when a servant slayeth his master, or a wife her
 " husband, or when a man secular, or religious, slayeth his prelate,
 " to whom he oweth faith and obedience; and of such treason the
 " escheats ought to pertain to every lord of his own fee: and be-
 " cause that many other like cases of treason may happen in time
 " to come, which a man cannot think nor declare at this present time,
 " it is accorded, that if any other case supposed treason, which is
 " not above specified, doth happen before any justices, the justices
 " shall tarry without any going to judgment of the treason, till the
 " cause be shewed and declared before the king and his parliament,
 " whether it ought to be judged treason, or other (*b*) felony: and
 " if *per casu* any man of this realm ride armed covertly, or secretly
 " with men of arms against any other to slay him, or rob him, or
 " take him, or retain him, till he hath made fine or ransom for to
 " have his deliverance, it is not the mind of the king, nor his
 " council, that in such case it shall be judged treason, but shall be
 " judged felony, or trespass according to the laws of the land of old
 " time used, and according as the case requireth. And if in such
 " case, or other like, before this time any justices have judged trea-
 " son, and for this cause the lands and tenements have come into
 " the king's hands as forfeit, the chief lords of the fee shall have
 " the escheats of the tenements holden of them, whether that the
 " same tenements be in the king's hands, or in others by gift, or in
 " other manner; saving always to our lord the king the year and

(*b*) The old translation seems here to abbreviate may be either *peccatum* or *casum*,
be preferable, viz. *case*; for *casu* being *casum*.

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“ the waſt, and the forfeitures of chattels, which pertain to him in
“ the cases above-named; and that *writs of scire facias* be granted
“ in ſuch caſe againſt the land-tenants without other original, and
“ without allowing any protection in the ſaid ſuit; and that of the
“ lands, which be in the king’s hands, writs be granted to the ſheriffs
“ of the counties, where the lands be, to deliver them out of the
“ king’s hands without delay.”

The ſeveral high treasons hereby declared are theſe:

- ‘ 1. The compaſſing of the death of the king, queen, or prince, and
declaring the ſame by an overt-act.
2. The violation or carnal knowledge of the king’s conſort, the
king’s eldest daughter unmarried, or the prince’s wife.
3. The levying of war againſt the king.
4. The adhering to the king’s enemies within the land or without,
and declaring the ſame by ſome overt-act.
5. The counterfeiting of the great ſeal or privy ſeal.
6. The counterfeiting of the king’s coin, or bringing counterfeit
coin into this realm.
7. The killing of the chancellor, treasurer, juſtices of the one
bench or the other, juſtices in eyre, juſtices of affiſe, juſtices of eyre
and terminer in their places doing their offices.

i. Hawk. P. C. 34, &c.

C H A P XIII.

*Touching high treason in compaſſing the death of the king, queen, or
prince.*

THE first article of high treason declared by the ſtatute of 25 E.
T 3. is this, and in theſe words :

“ *When a man doth compaſſ or imagine the death of our lord the
king, or of our lady the queen, or of their eldest ſon and heir.*”

Upon this diſtiion there will be theſe conſiderations.

[92]

- I. What ſhall be ſaid *a man that compaſſeth.*
- II. What ſhall be ſaid the *king, queen, or their eldest ſon.*
- III. What ſhall be ſaid *a compaſſing or imagining of any of their
deaths.*

VI. What

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IV. What shall be evidence, or an *overt act* to prove such imagining.

V. The form of an indictment of compassing the death of the king, queen, or prince.

I. What shall be said *a man compassing, &c.*

The general learning of this point in relation to natural, accidental, or civil incapacities hath been at large handled in the former chapters; but there is something peculiar to the case of high treason, which is considerable in this division.

If an *alien army* comes into *England*, and here compasses the death of the king, queen, or prince, this is a man compassing within this law; for, tho he be the natural subject of another prince, yet during his residence here he owes a local allegiance to the king of *England*, and tho the indictment shall not style him *naturalis subditus*, nor style the king *naturalem dominum*, yet it shall run *proditorie & contra ligantia sue debitum*. *Co. P. C. p. 5. 7 Rep. Calvin's case (a). Dyer 144.*

If an *alien amy* subject of another prince comes into this kingdom and here settles his abode, and afterwards war is proclaimed between the two kings, and yet the alien continues here and takes the benefit of the king's laws and protection, and yet compasses the death of the king, this is a man compassing within this law; for, tho he be the natural subject of another prince, he shall be dealt with as an *English* subject in this case, unless he first openly remove himself from the king's protection by passing to the other prince, or by a public renunciation of the king of *England's* protection, which hath some analogy with that, which they call *dissidatio*, or defiance.

And the same law I take to be, if the subject of a foreign prince in war with ours come into *England* and here trade and [93] inhabit either as a merchant, dweller, or sojourner, if such a person compasses the death of the king, he may be dealt with as a traitor, because he comes not hither as an enemy, or by way of hostility, but partakes of the king's protection: with this agrees the case of *Stephano Farrrara de Gama*, and *Emanuel Lewes Tinoco*, *Portuguese* born, and then subjects to the king of *Spain*, between whom and the queen of *England* there was then open war, who were indicted and attaint of high treason for conspiring with Dr. *Lopez* to poison the queen (b). *37 Eliz. Calvin's case. 7 Co. Rep. p. 6.*

(a) fol. 6, 17.

(b) *Vide Camdeni Eliz. sub anno 1594.*

And

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And, tho they came hither with the queen's protection, it alters not the case, for every foreigner living publicly and trading here is under the king's protection : and this appears by the statute of *Magna Charta*, cap. 30. “ *Et si de fint terrâ contra nos guerrinâ, & tales inventantur in terrâ nostra in principio guerre, attachientur sine danone corporum suorum vel rerum, donec sciatur a nobis vel a capitali justiciario nostro, quomodo mercatores terræ nostræ trahentur, qui tunc invensiantur in terrâ illâ contra nos guerrâ; & si nostri salvi fint ibi, alii salvi fint in terrâ nostrâ.* ”

The statute speaks indeed of *mercatores*, but under that name all foreigners living or trading here are comprised.

And therefore in ancient times before the subjects of foreign princes in hostility residing here were dealt with as enemies, a proclamation issued for their avoidance out of the kingdom ; and in default of their avoidance within the time limited by such proclamation they lost the benefit of the king's protection.

And after such proclamation, yet upon caution given sometimes by mainprise *de se bene gerendo*, sometimes by oaths of fidelity to the king, they had sometimes special, and oftentimes general protections, notwithstanding such hostility. *Rot. Vascon.* 18 E. 2. 21, 24. *Pat. 14 H. 6. part. 2. m. 34, 35.*

The statute of the *Staple* (c), cap. 17. hath made provision for merchant strangers, in case war shall happen between their prince and the king of *England*, viz. that they shall have convenient warning by [94] forty days by proclamation to avoid the realm ; and if they cannot do it by that time by reason of some accident, they shall have forty days more, and in the mean time liberty to sell their merchandizes: during these eighty days they have the king's protection, and if they do any treasonable act above-mentioned, they shall be indicted of treason, notwithstanding the hostility between their sovereign and the king of *England*; but it seems, that if he remain here in a way of trade after proclamation so made, and the time of his demurrage allowed by this act, he may be dealt with as an alien enemy ; but yet if he after that time continues in his way of trade or living as before, and shall then conspire the king's death, &c. the king may deal with him as an alien enemy by the law of nations, or as a traitor by the law of the land ; because *de facto* he continues as a subject, and under the benefit *de facto* of the king's protection.

Therefore the general words in *C. P. C.* page 5. wherein he supposeth an alien enemy cannot be guilty of treason, but must be dealt with by martial law, are to be taken with that allay, that is given in *Calvin's case*, fol. 6. b. in these words; “*But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason, for the indictment cannot conclude contra ligeantie sua debitum:*” the like may be said of such as are sent over merely as spies by a foreign prince in hostility; but an alien enemy living here in the condition of an inhabitant or trader may be guilty of treason as well as an alien *amy*, for he doth it *proditorie* and treacherously, and against the obligation that lies upon him, as well as any others, to be true to the prince, the benefit of whose laws and protection he holds, so long as he is under the same.

But yet this is observable upon the statute of *Magna Charta*, cap. 30. and what hath been before said, 1. That if an alien enemy comes into *England* after the war begun, and lives here under the king's protection as a subject, yet if he practise treason against the king during such his abode here, he may be indicted of high treason *contra ligeantie sua debitum*. 2. Yet such an alien, coming in after the war begun without the king's licence or safe-conduct, cannot claim the privilege allowed by the statute of *Magna Charta*, cap. [95] 30. to those that were here before the beginning of the war. 2 *C. Inst.* 58. 3. That by the law of *England* debts and goods found in this realm belonging to alien enemies belong to the king, and may be seized by him. 19 *E. 4.* 6. 7 *E. 4.* 13. and therefore in debt brought by an alien enemy it is a good plea in bar *prima facie*, that the person is an alien born in G. in *partibus transmarinis sub obedientia* Philippi regis Hispaniae hostis & inimici domini regis; so that, tho to some purposes he is under the king's protection, so as to be guilty of treason, if he conspire against the king's life, yet his goods are not by law privileged from confiscation; and the reason is, because he might secure his goods by purchase of letters patents of denization, and he shall not take away the king's rights by his neglect therein.

But then, what if in truth our merchants have liberty of reclaiming their goods and recovering their debts in the hostile country? May the merchant plaintiff reply with this clause of the statute of *Magna Charta*, that “*Nostris mercatoribus salvi sunt ibi, &c.*?”

I answer, he cannot, for it is reserved to another kind of trial; for the words are “*dunc sciatur a nobis vel a capitali iustificario nostro,*

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"*quomodo mercatores nostri ibi tractentur.*" The king must be ascertained of the truth of the fact, in whose cognizance it best lies; and if he be satisfied, that our merchants are permitted to recover their debts in the hostile kingdom without impediment or confiscation, this is to be notified and declared by some proclamation, or instrument under the great seal declaring the fact, and allowing them to prosecute for their debts here; and then, by virtue of this statute or public declaration, the merchant alien plaintiff may reply with this special matter in maintenance of his action.

Here somewhat may be of use to be said touching treasons by ambassadors of foreign princes, wherein altho sometimes reason of state and the common interest of princes do *de facto* govern in these cases,

[96] yet it will not be amiss to consider the opinions and practices of former times in relation to this matter.

First, If an *Englishman* born, tho he never took the oath of allegiance, becomes a sworn subject to a foreign prince, and is employed by him into *England* as his minister, agent, or ambassador, and here conspires against the king's life, he shall be indicted and tried for treason, as another subject should be; and the reason is, because no man can shake off his country wherein he was born, nor abjure his native soil or prince at his pleasure. This was the case of *Dr. Story*, who had sworn allegiance to the crown of *Spain*, and was here condemned and executed for treason. *Vide Camden's Eliz.* 14 p. *Eliz.* 168 (*d*).

Secondly, But if a foreigner being the agent, minister, or ambassador of a foreign prince either in amity or enmity with the king of *England* come over with or without the king's safe-conduct, and here conspire against the life of the king, or to raise rebellion or war against him, some have been of opinion, that he may be indicted of treason; but by the civilians he cannot, because he came in as a foreign ambassador representing the person of his prince, and therefore is not to be so dealt with in such case, but by the law of nations may be dealt with as an enemy, not as a traitor; and tho he have the protection and safe-conduct of the king of *England*, yet it is under a special capacity, and for a special end, namely, as a foreign agent, but if he be criminally proceeded against, it must be as an enemy by the law of war or nations, and not as a traitor; but how far and in what

(d) *English felonies*

causes

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Cases he may be dealt with as an enemy, remains to be farther considered. *Camden's Eliz. sub anno 1571. p. 164.*

Thirdly, therefore those, that are most strict after the rights and privileges of ambassadors, yet seem to agree, that if he do not only conspire the death of the king or the raising a rebellion against him, but actually attempt such an act, as actually or interpretatively is a consummation thereof, tho' possibly the full effect thereof do [97] not ensue, yet he may be deak withal as an enemy, and by the law of nations he may be put to death, as if he should stab or poison the prince, and yet doth not kill him, or raise an actual rebellious army, or should levy an actual war against the prince to whom he was sent, and in that prince's country, as *Fabius* (e) the Roman ambassador to the Gauls, by challenging and fighting with the champion of the Gauls; *Plutarch in vitâ Numa*, the prince, to whom he is sent, may, without consulting the prince that sends him, inflict death upon such an ambassador by the law of nations, as an enemy: "Consummata autem sunt, que eosque producta sunt, quo " produci ab hominibus solent, & quæ delinquendi finem statuere solemus. " Vide *Albericus Gentilis, Lib. II. cap. 2. de legationibus.*"

Fourthly, But in case of a bare conspiracy against the life of the king, or a conspiracy of a rebellion or change of government, *novarum rerum molimina*, there is great diversity of opinions among learned men, how far the privilege of an ambassador exempts him from penal prosecution as an enemy for such conspiracies or inconsummate attempts, that do not proceed farther than the machination, solicitation, or conspiracy.

Upon an attempt of this nature by the bishop of *Roffe*, agent and ambassador of the queen of *Scots*, 14 *Eliz.* the question was propounded to *Lewes, Dale, Drury, Aubry, and Jones*, doctors of law, *viz.*

"Whether an ambassador, who stirreth up rebellion against the prince to whom he is sent, should enjoy the privileges of an ambassador, and not be liable to the punishments of an enemy?"

They answered, that such an ambassador hath by the law of nations, and by the civil law of the *Romans*, forfeited all the privileges of an ambassador, and is liable to punishment. See the rest of the resolutions touching this matter *Camden's Eliz. sub anno 1571. p. 164, 165. &c ibidem p. 370.*

(e) *Fabius Ambitus.*

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Heresupon he was committed to the Tower, but yet no criminal process against him as an enemy.

[98] And *Mendoza* the *Spanish* embassador, who here in *England* fostered and encouraged treason, was not dealt with according to the utmost severity, that possibly in such cases might be used, but was only sent away, *sub anno 27 Eliz. Camden's Eliz. p. 296.* The lord *L'Aubespine* also, the *French* embassador, that conspired the queen's death, was not proceeded against criminally, but only reproved by *Burghley*, and advised to be more careful for the future. *Camden's Eliz. sub anno 1587. p. 378, 379.*

And upon these and some antient instances among the *Romans* and *Carthaginians* learned men have been of opinion, that an embassador is not to be punished as an enemy for traitorous conspiracy against the prince, to whom he is sent, but is only to be remitted to the prince that sent him. *Albericus Gentilis de Legationibus, Lib. II. cap. 18. Grotius de Jure Belli, Lib. II. cap. 18. (f) who gives these two instances in confirmation thereof.*

The truth is, the busyness of embassadors is rather managed according to rules of prudence, and mutual concerns and temperaments among princes, where possibly a severe construction of an embassador's actions, and prosecutions of them by one prince may at another time return to the like disadvantage of his own agents and embassador's; and therefore they are rather temperaments measured by politic prudence and indulgence, than according to the strict rules of reason and justice; for surely conspiracies of this kind by embassadors are contrary to the trust of their employments, and may be destructive to the state whereunto they are sent, and according to true measures of justice deserve to be punished, as acts of enmity, hostility, and treachery by private persons.

And altho of all hands it is admitted, that the prince, to whom the embassador is sent, is the judge of the miscarriage of such foreign embassador without any application to the master from whom he is sent, and without any actual deditio[n] or giving him up to the judgment of the law; yet they assign this reason of the difference between a bare conspiracy or machination against the prince, and an ac-

[99] tual attempt of treason, whether against his person or government, which hath attained as great a consummation as such embassador is able to effect, as procuring the wounding of the prince;

or an actual attempt to poison him, tho' death ensue not, or an actual raising of a rebellious army against him; because in these latter the mischief is consummate, as far as the embassador could effect it, and so prohibited not only by the civil and municipal laws, but by the laws of nations; but unconsummated machinations, accord to their opinions, are raised to the *crimen læse majestatis* by civil or municipal laws or constitutions; and they think it too hard, that an embassador or foreign agent, who doth *suffinere personam principis*, should be obnoxious to a capital punishment for bare machination or conspiracy, which is a secret thing and of great latitude; but this, as I have said, is rather a prudential and politic consideration, and not according to the strict measure of justice.

But now, altho' it should be admitted that a foreign embassador committing a consummate treason is not to be proceeded against as a traitor, but as an enemy; yet if he or his associates commit any other capital offense, as rape, murder, theft, they may be indicted and proceeded against by indictment in an ordinary course of justice, as other aliens committing like offenses; for tho' those indictments run *contra pacem regis*, yet they run not *contra ligeantia sue debitum*; and therefore, when in the late troubles the brother and servants of the *Portugal* embassador committed a murder in the *Exchange* (*g*), they were tried and convicted by a special commission of *oyer and terminer* directed to two judges of the common law, some civilians, and some gentlemen, to proceed according to the ordinary course, *secundum legem & consuetudinem regni Angliae*, whereupon some of them were convict by jury, and had judgment; and, as I remember, some of them were executed (*h*). And yet many civilians (*i*) allow [100] the same privilege to the *comites legati*, as to the embassador himself.

And the difference between proceeding against an alien (whether embassador or other) in cases of felony and treason, is well illustrated by the book of 40 *Aff.* 25. where a *Norman* captain of a ship with the help of *English* mariners committed robbery and piracy upon the narrow seas; the *English* pirates were convict and attaint of trea-

(*g*) The *New Exchange* in the *Strand*.

(*b*) Don *Pantaleon So*, the embassador's brother, was condemned to die for it: he had like to have prevented his execution by making his escape out of *Newgate*; but he was retaken, and beheaded on *Tower-*

bill, July 10, 1654, the same day the embassador signed the peace between *England* and *Portugal*.

(*i*) *Dig. Lib. XLVIII. tit. 6. ad leg. Jul. de vi publica, l. 7. Grot. de iur. Belli, Lib. II. cap. 18. §. 8.*

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son (*k*), but the *Norman* captain was attaint of felony, but not of treason, because it could not be said *contra ligantæ suæ debitum*.

The queen consort the wife of the king, or the husband of the queen regent, compassing the death of the king her husband or the queen regent his wife, are persons compassing within this act. *Co. P. C. p. 8.*

II. As to the second inquiry, what shall be said *a king, queen, or their eldest son*, within this law.

1. The words *our lord the king, &c.* extend to his successor, as well as to him (*l*).

1. Because it is a declarative law.

2. Because usually acts of parliament speaking thus generally, and not confining it to the person of that king, when the law passed, *include his successor*; therefore the statute of 8 H. 6. cap. 11. 23 Hen. 8. for *Brewers*. 27 H. 8. cap. 24. that were limited to continue during the pleasure of our lord the king, (*m*), continued after that king's death: *Mich. 33 & 39 Eliz. Cro. Eliz. 513. Lord Darcis case.* The statute of 11 H. 7. c. 1. of aiding our lord the king in his wars extends to the successor (*n*). *Hill. 10 Jac. 12 Co. Rep. 109. M. 21 Eliz. Moore 176. Coke Litt. 9. b. (o).* But the statute of 34 & 35 H. 8. cap. 26. giving power to our said lord the king to alter the laws of *Wales*, died with him (*p*); yet *in majorem cautelam* it was specially repealed by the statute of 21 Jac. cap. 10.

(*k*) For before the 25 E. 3. piracy was petit treason. *Co. P. C. 113.* and tho' this case be quoted in the 40 E. 3. yet it must be intended to have happened before the statute of 25 Ed. 3. because piracy, not being enumerated therein among the species of treason, has never been counted treason since that statute. *Co. P. C. 8.*

(*l*) *Vide Co. P. C. p. 6.*

(*m*) Of these statutes the first only is so limited; but the 23 H. 8. cap. 4. *scilicet* 5, 14. and 27 Hen. 8. cap. 24. *scilicet* 10. only name the king without the addition of *bis heirs and successors*. 10 H. 7. 7. b. it is said by *Kebble* with relation to 9. H. 6. cap. 2. and not denied by the court, that where a statute limits to continue *so long as it shall please our lord the king*, it continues in force, if no proclamation be made to the contrary in the times of that king or of any of his successors.

(*n*) This statute comes not up to the point, because the words of it are not, *our lord the king, but, the king and sovereign lord of this land for the time being*. Our author seems to have intended the *Irish* statute of 10 H. 7. called *Poyning's act*, upon which act a doubt was conceived, whether it extended to the successors of H. 7. for

that the act speaks only of the king generally, and not of his successors: the chief justices, chief baron, attorney and solicitor general were of opinion, that the word *king* imported his politic capacity, which never dies; and therefore being spoke indefinitely, extended in law to all his successors, and was so expounded by an *Irish* act in the 3 & 4 Phil. & Mar. 18 Co. Rep. 109.

(*o*) The case in *Moore* relates to statutes during the pleasure of the King; the words are, “*Walmsley moved a question, whether the demise of the king determines a statute limited to continue during the king's pleasure, and the whole court agreed that the demise of the king determines his will.*”

(*p*) The words of that statute, §. 119 are, “*That the king's most royal majesty shall and may, &c. as to his most excellent wife dom and discretion shall be thought convenient; and also to make laws, &c. at his majesty's pleasure.*” It was resolved by the justices, *Hil. 5. Jac. 12 Co. Rep. 48.* that this was a temporary power, and confined to the person of king *Henry VIII*. *Vide Plowden 176. b. &c. 458 a.*

2. The

2. The heir of the king is a king within this act the next moment after the death of his ancestor, and commenceth his reign the same day the ancestor dies; and therefore the compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death, for he is a king presently upon the ancestor's death; and the proclamation or coronation are but honourable ceremonies (*q*) for the farther notification thereof: resolved 1 Jac. in the case of *Watson and Clark. Co. P. C. p. 7.*

3. The queen regent, as were queen *Mary* and queen *Elizabeth*, is a king within this act (*r*).

4. A king *de facto* but not *de jure* (*s*), such as were *H. 4. H. 5. H. 6. R. 3. H. 7.* being in the actual possession of the crown is a

G 4

king

(*q*) The coronation is something more than only an honourable ceremony, for it is a solemn engagement to govern according to law, which was always required by the ancient constitution of the kingdom. *Brompton* speaking of the coronation of *W. I.* says, the archbishop of York performed the office. *Ipsiusque Galilelmum regem ad iura ecclesie Anglicane tuenda & conservanda, populusque suum recte regendum, & legis reiaras faciendum sacramento solemniter adficiatis;* and *Braet. Lib. III. cap. 9.* says, that the king of England debet in coronatione sua in nomine Jesu Christi praeferre sacramenta hac tria promittere populo sibi subditu, &c. See also *1 W. & M. cap. 6.*

(*r*) *Vide Co. P. C. p. 7.* This appears by the declarative law in favour of queen *Mary*, 1. *Mar. cap. 1. scff. 3.*

(*s*) This distinction, which with respect to the kingly office was never known in our law before the Statute of 1 E. 4 seems to have been purposely invented to serve the turn of the house of York; nor do I find any such distinction ever mentioned or supposed in any of our ancient law-books, save only in *Bagot's case*, 9 E. 4. 1. b. cited by our author, p. 61. for the doubt conceived by *Markham*, 4 E. 4. 43. a. concerning the authority of coroners chosen in the time of *H. 6.* was not founded (as some have supposed) on *H. 6.* being only king *de facto*, but on another point, viz. whether the demise of the crown did not determine the power of coroners, as it does the commissions of judges and other commissioners; and as to *Bagot's case*, if carefully considered, it will but little serve the purpose of such a distinction, for the principal point in that case was concerning the validity of letters patent of denization granted to *Bagot* by *H. 6.* whether they were void by the act of 1 E. 4. set forth in the

pleadings; this point was not argued by the judges, but by the serjeants and apprentices, 9 E. 4. 2. a. it will therefore be necessary to distinguish the discourse of the council from the resolution of the court.

Bagot's counsel asserted, "That all judicial acts relating to royal jurisdiction, which were not in diminution of the crown, tho' done by an usurper, would nevertheless bind the king *de jure* upon his regres; that *H. 6.* was not merely an usurper, the crown having been entailed on him by parliament, that *Bagot's* denization was an advantage to the prince on the throne, for the more subjects he had, the better it was for him; and they likened it to the case of recoveries suffered in a court-baron, while the disseisor was in possession, which would continue in force notwithstanding the re-entry of the disseisee."

This was all that could be expected for them to say, considering that *E. 4.* was then on the throne, and they were obliged to admit, that grants of the regal revenue made by *H. 6.* were void against *E. 4.* because the act of parliament of *E. 4.* which declared *H. 4. H. 5. and H. 6.* usurpers, vested in *E. 4.* all such manors, castles, borrows, liberties, franchises, reverberations, remainders, &c. and all hereditaments with their appurtenances, whatsoever they were, in England, Wales, and Ireland, and in Calais, as king *Richard II.* had on the feast of St. Matthew the twenty-third year of his reign in right of the crown of England and lordship of Ireland: all meine grants therefore of such manors, &c. were by this act indisputably defeated.

The counsel on the other side objected,
"That the letters patent of denization
were void, for that the king ought not
to be in a worse condition than a com-

"mon

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king within this act, so that compassing his death is treason within this law; and therefore the 4 E. 4. 20. a. (t), a person that compassed [103] the death of H. 6. was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown (*), which afterwards obtained, this had not been treason, but *é converso* those that assisted the usurper, tho in actual possession of the crown, have suffered as traitors.

" mon person ; and that if a common person were disfised and re-entered, his re-entry would defeat all misne acts ; and that therefore E. 4. being by descent from king Richard, and this act being but an affirmation of the common law, his regres wold avoid all acts done by the usurper, for which reason provision was made in that act for grants of wards, licences of mortmain, charters of pardon, and judicial acts, but no provision was made for grants of denization ; that the patent in controversy was to the disadvantage of the king, since it was not reasonable, that such an alien should be made his subject against his will, for by the same reason H. 6. might have made twenty thousand Frenchmen denizens ; that if a league was made between H. 6. and another king, it would not bind E. 4. and yet such league is intended for the advantage of the realm ; that an exemption granted by H. 6. from being put upon juries in assizes, &c. would now be void."

Here Billing the chief justice interposed and said, *I do not agree to this*; he added, " It pertains to every king by reason of his office to do justice and grace, justice in executing the laws, &c. and grace in granting pardon to felons, and such legitimation as to this is." Yelverton seemed at first to think that the denization was void, not because the regres of E. 4. avoided all misne acts done by H. 6. but because the act of E. 4. refuted all liberties and franchises, and denization being a liberty was therefore refuted.

The cause was adjourned, during which time it was abated by the death of Swindens one of the plaintiffs; a new assize was brought by Bagot, and the same matter was pleaded as before; the assize was taken, and the verdict was in favour of Bagot 9 E. 4. 5. the defendant's counsel moved in arrest of judgment, and Brian (who was of counsel against Bagot, and not one of the Judges) repeated the former objection, that since E. 4. was in possession by remitter, as cousin and heir of king Richard, the patent of denization by H. 6. who was but an usurper and intruder was void, 9 E. 4. 5. but the justices said, that they had con-

firmed upon all points of this case with the justices of the common pleas, and they were all of opinion, that those matters were not sufficient to arrest judgment ; and accordingly judgment was given for Bagot 9 E. 4. 12. a. abridged in Br. Patent 3 L. Desizens 2. Charte de Pardon 22. Exemption 4. Judgment 42. F. Assise 29. Desizens 1.

From this state of the case it appears, that the question was entirely upon the construction of an *act of parliament*, and not upon any maxims of *common law* ; and then it was said, that that act was an affirmation of the common law, yet that was only the saying of *counsel*, and unsupported by any book-case or record : so that the distinction here taken by our author between a *rex de facto* and a *rex de jure* being no way warranted by the constitution or common law of this kingdom, all that is here said by him on that opposition must fall to the ground.

(t) This case is cited before by our author p. 61. but is somewhat differently related in Stow's *Annals*, p. 418. *Sed. Titulus of Honour*, cap. 5. p. 654.

(*) But who shall take upon them to determine who that is ? Our author therefore prudently adds, *which afterwards obtained*, for this is the most effectual way of deciding questions of this nature ; but then by the same rule, if he should not obtain, such act of hostility had been treason, for it cannot be imagined, that any prince in the actual possession of the government will suffer his own title to be disputed, nor indeed is it fitting, that private subjects should set themselves up for judges in such an affair, whose duty it is to pay a legal obedience to the powers that are in fact set over them ; for the powers that be, are *ordained of God*. Rom. xiii. 1.

This serves to shew how idle the distinction is between a *rex de jure* and a *rex de facto*, which is not only founded on a precarious bottom, but also must in fact prove a distinction without a difference, being equally serviceable to all sides and parties ; and thus it was in regard of H. 6. and E. 4. who were both of them by turns declared by parliament to be rightful kings and usurpers,

tors, as appears by the statute of 1 E. 4 (†), and as was done upon the assistants of H. 6. after his temporary re-adoption of the crown in 10 E. 4. and 49 H. 6.

5. A king admitting by act of parliament his son *in confirmationem imperii*, as was done by H. 2. whereby there was *rex pater* and *rex filius*, only the father reserved to himself the lige homage or allegiance of his subjects, yet the son actually administered the kingdom; the father continued a king, and a treason committed against [104] him by his son or any of his subjects was treason within this act; and so was the son a king within this act, as in reference to all but the father, a subordinate king, that had the *jura imperii*, as the king of Scots was after his homage done to king Edward I. and therefore compassing his death by any of his subjects had been high treason within this act, if it had been then made; for it is mistaken in lord Coke's P. C. p. 7. that H. 2. resigned his crown, for he continued still *rex de facto & de jure*, as Hoveden tells us. *Vide supra cap. 10.*

Having thus shewn who is a king within this act, we shall the more easily see who is not a king within this act.

1. The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within this act; such was the case of the house of York during the plenary possession of the crown in H. 4. H. 5. H. 6. but if the right heir had once the possession of the crown as king, tho' an usurper hath gotten the possession thereof, yet the other continues his style, title and claim thereunto, and afterwards re-obtains the full possession thereof, a compassing the death of the rightful heir during that interval, is a compassing of the king's death within this act, for he continued a king still, *quæsi* in possession of his kingdom; this was the case of E. 4. in that small interval; wherein H. 6. re-obtained the crown, and the case of E. 5. notwithstanding the usurpation of his uncle R. 3.

2. If a king voluntarily resign, as some in other countries have done, and this resignation admitted and ratified in parliament, he is not afterwards a king within this act (‡); but we never had such an example in England, for that of R. 2. was a constrained act, touching

(†) This must have been for acts before E. 4. first obtained the crown, and therefore was wrong according to our author's *non docere* doctrine, because, as he says below,

even the rightful heir before he has got possession of the crown is not a king within the statute of 1 E. 3.

(‡) The same reason holds in the case of a king,

ing which and the deposition of *E. 2.* I shall not say farther, for they were acts of great violence and oppression.

[105] Only thus much is certain, that altho *E. 2.* had a kind of pretended depositing, and his son *E. 3.* took upon him the kingly name, and office, yet in the opinion of those times *E. 2.* continued, as to some purposes, his regal character, for in the parliament of 4 *E. 3.* Mortimer, Berisford, Guerney, and others had judgment of high treason given against them for the death of *E. 2.* after his deposition.

Neither was this judgment grounded simply upon that old opinion in Britton (x), that killing of the king's father was treason; for, tho in some parts of that record, as in the judgment of the lords against Mortimer, the words are, *Touchant le mort seigneur Edward pere nostre seigneur le roy, qe ore est,—countes, barons, & peres, come jugges de parlement, agarderent & adjuggerent le dit Roger, come treor & enemy de roy & de realme, feust traene & pendu;* yet in other parts of that roll of parliament he is styled at the time of his murder *seignior tige*, and sometimes *rex*, as n. 6. The lords make their protestation, that they are not to judge any but their peers; yet they declare that they gave judgment upon some that were not their peers, in respect of the greatness of their crimes; *et ce per encheson de murder du seigneur lige, &c.* and in the arraignment of Thomas lord Berkele for that offense, the words of the record are, *Qualiter se velit acquietare de morte ipsius domine regis*, who pleaded, *Quod ipse de morte ipsius domini regis in nullo est inde culpabilis*; and the verdict, as it was given in parliament, 4 *E. 3.* n. 16. and the record is, *Quod praedictus Thomas in nullo est culpabilis de morte praedicti domini regis patris domini regis nunc*; so that the record styles him *rex* at the time of his death, and yet every one acquainted with history knows, that his son was declared king, and took upon him the kingly office, and title upon the twenty-fifth, or, according to Walsingham, the twentieth of January; and *E. 2.* was not murdered till the twenty-first of September following.

I have been the longer in this instance, tho it were before the making of the statute of 25 *E. 3.* when treason was determined

a king, who is deemed by parliament to have abdicated, or by actions subversive of the constitution virtually to have renounced the government; this was the case of king James II. who, tho not in words, yet by

acts and deeds equally expressive had renounced holding the crown upon the terms of the constitution.

(x) *Brit. cap. 22. Co. P. C. p. 7.*

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according to the common law, that it may appear, that this judgment was not singly upon this account, that he was father to king E. 3. but that notwithstanding the formal deposing of him, and that pretended or extorted resignation of the crown mentioned by the histories of that age, yet they still thought the *character regius* remained upon him, and the murder of him was no less than high treason, namely, the killing of him who was still a king, tho deprived of the actual administration of his kingdom.

3. The husband of a queen regent is not a king within this law, for the queen still holds her sovereignty entirely, as if she were sole: *vide 1 Mar. cap. 2. s^tff. 3.* and for the remedy thereof there was a special temporary act made enacting and extending treason as well to the compassing of the death of king *Philip of Spain* husband to queen *Mary*, as of the queen, and for the making of other acts against the king, as against the queen, within the compass of high treason, during the continuance of the marriage between them. *1 & 2 Phil. & Mar. cap. 10.* so that it seems, tho the husband of a queen regent be as near to him, as the wife of a king regnant, the statute of 25 E. 3. declaring the compassing of the death of the king's wife to be treason, did not extend to the husband of a queen regent (*y*).

4. A *prorex, viceroy, custos regni, or justiciarius Angliae*, which import in substance the same office, *viz.* the king's lieutenant in his absence out of the kingdom, is not a king within this act (*z*), tho his power be very great, and all commissions, writs and patents pass under his *testa*; and the same law is touching the lord lieutenant or *justiciarius Hiberniae* or his deputy. *Vide statut. Hiberniae.*

Rot. Parl. 31 H. 6. n. 38 & 39. Richard duke of York by the king's letters patent, and by consent of parliament, was constituted *protector & defensor regni, & ecclesiae Anglicanæ, & consiliarius regis principialis*, till the full age of the prince, or till discharged of that employment by the king in parliament by the consent of the lords spiritual and temporal; tho this were a high office, and exceeded much the power of a protector of the king during his minority, such as were the earl of *Pembroke* to *H. 3.* and the duke of *Somerset* to *E. 6.* yet this protector was not a king within [107] this statute.

(y) *C. P. C. p. 6, q.*

(z) *C. P. C. p. 8.*

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III. I come to the third division, what shall be said *a compassing or imagining of the death* of the king, queen, or prince.

The words *compass* or *imagine* are of a great latitude.

1. They refer to the purpose or design of the mind or will, tho' the purpose or design take not effect.

2. Compassing or imagining singly of itself is an internal act, and without something to manifest it, could not possibly fall under any judicial cognizance, but of God alone; and therefore this statute requires such an overt-act, as may render the compassing or imagining capable of a trial and sentence by humani judicatores.

And yet we find that other laws, as well as ours, make compassing or conspiring the death of the prince to be *crimen lese maiestatis*, tho' the effect be not attained.

Ad legem Julianam maiestatis in Codice (a) in the law of Honorius and Arcadius, Quisquis cum militibus, vel privatis, vel barbaris sceleram inierit factionem, vel factionis ipsius suscepit sacramentum vel dederit, de nece etiam virorum illustrium, qui consiliis & confistorio nostre interfuerint, senatorum etiam (nam & ipsi pars corporis nostri sunt), vel cuiuslibet postremo, qui nobis militat, cogitaverit, (eadem enim severitate voluntatem sceleris, quam effectum, puniri jura voluerunt) ipse quidem, utpote maiestatis reus, gladio feriatur, bovis ejus omnibus fisco nostro additis.

A bare accidental hurt to the king's person, in doing a lawful act, without any design or compassing of bodily harm to the king, seems not a compassing of the king's death within this act.

Walter Tirrel by command of William Rufus shot at a deer; the arrow glanced from an oak, and killed the king; Tirrel fled, but this being purely accidental, without intention of doing the king any harm, hath been held not to be a compassing of the king's death.

Cœ. P. C. p. 6. Paris & Hoveden anno ult. Willielmi secundi.

[108] Calculating of the king's nativity, or thereby or by witchcraft, &c. seeking to know, and by express words, writing, &c. publishing and declaring how long the king shall live, or who shall succeed him, or advisedly or maliciously to that intent uttering any prophecies, seems not a compassing of the king's death within the statute of 25 E. 3. (b), but was made felony during the life of

(a) Lib. IX. tit. 8. l. 5. pr.

(b) Even before that statute, viz. Hil. 18. E. 2. Rot. 24. rex coram rege, there was an instance of several persons charged with endeavouring to compass the king's

death by necromancy by making his image in wax, &c. yet they were appealed only *de feniis & maleficio*, and were all acquitted by the jury.

queen

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queen *Elizabeth* by 23 *Eliz.* cap. 2. and before that, was only punishable by fine and ransom. *Co. P. C.* p. 6.

Compassing the death of the king is high treason (*c.*), tho it be not effected; but because the compassing is only an act of the mind, and cannot of itself be tried without some overt-act to evidence it, such an overt-act is requisite to make such compassing or imagination high treason. *De quo infra.*

IV. Therefore as to the *overt-act* in case of compassing the death of the king, queen, or prince.

1. Tho the words in the statute of 25 *E. 3.* and be provably thereof attaint by open deed, &c. come after the clause of levying of war, yet it refers to all the treasons before-mentioned, viz. compassing the death of the king, queen, or prince. *Co. P. C.* & 12. and therefore what is said here concerning the compassing of the death of the king is applicable to queen and prince.

And therefore in an indictment of treason for compassing the death of the king, queen, or prince, there ought to be set down both the treason itself, viz. *Quod proditoris compassavit & imaginatus fuit mortem & destructionem domini regis, & ipsam deminum regem interficere,* and also the overt-act, *& ad illam nefandam & proditoriam compassationem & propositionem perimplend'*, and then set down the particular overt-act certainly and sufficiently, without which the indictment is not good. *Co. P. C.* p. 12.

2. If men conspire the death of the king and the manner, [109] and thereupon provide weapons, powder, harness, poison, or send letters for the execution thereof; this is an overt-act within this Statute. *Co. P. C.* p. 12.

3. Tho the conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something that in all probability must induce it, and the overt-act is of such a thing as must induce it; this is an overt-act to prove the compassing of the king's death, which will be better explained by the instances themselves, and therefore,

4. If men conspire to imprison the king by force and a strong hand, 'till he hath yielded to certain demands, and for that purpose gather company or write letters, this is an overt-act to prove the compassing of the king's death, for it is in effect to despoil him of his kingly

(c) Inasmuch that where the king is death which is the treason, and not the killing, which is only an overt-act. *Kel. S.* govern-

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government, and so adjudged by all the judges in the lord Cobham's case, 1 Jac. (d) and in the case of the Earl of Essex, 43 Eliz. (e), Co. P. C. p. 12. But then there must be an overt-act to prove that conspiracy to restrain the king, and then that overt-act to prove such a design is an overt-act to prove the compassing the death of the king.

But then this must be intended of a conspiracy forcibly to detain or imprison the king; and therefore, when in the time of R. 2. in parliament a commission was somewhat hardly gotten from the king, which seemed to curb his prerogative too much, the answer of the judges to the general question, “*Qualem penam merentur illi, qui compulerunt sive arclaverunt regem ad consentiendum dictum status ordinacionis nationis & commissionis? ad quam questionem unaniniter responderunt, quod sunt, ut proditores, meritum puniendi, Rot. Parl. 11. R. 2. (f).*” was too rash and inconsiderate, and for which the judges themselves were condemned as traitors, as before is shewn (g); for *compulerunt* and *arclaverunt* may have a double construction; either it may be intended of an actual force used upon the person of the king, as by restraint, imprisonment, or injury to his person, to enforce [110] his consent to that commission; and then it had not differed from the execrable treason of the Spencers, who declared, that since the king could not be reformed by suit of law, it ought to be done *per asperitas*, for which they were banished by two acts of parliament (h). *Vide 7 Co. Rep. fol. 11. in Calvin's case.* 2. Or it might be intended, not of a personal compulsion upon the king, but by not granting supplies, or great persuasion or importunity, and then it could not be treason; the latter whereof was the only compulsion or arclation, which was used for the obtaining that commission.

And therefore the judges that delivered that opinion, were inexcusable in their decision of treason under such ambiguous and large expressions of *compulerunt* & *arclaverunt*; and tho the parliament of 11 R. 2. was repealed by 21 R. 2. yet that again was repealed 1 H. 4. cap. 3.

5. A conspiring to depose the king, and manifesting the same by some overt-act, is an overt-act to prove the compassing of the death

(d) *State Trials*, Vol. I. p. 206.

(e) *State Trials*, Vol. I. p. 199.

(f) *State Trials*, Vol. I. p. 9.

(g) cap. XI. p. 94.

(h) One in the reign of Edward II. called *Basilus Hugonis le Spencer*; and the other in *esse* in Edward III. cap. I.

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of the king within this act of 25 E. 3. *Vide 1 Mar. B. Treason 24.*

(i) *Co. P. C. p. 12.*

It is true, that by the statute of 21 R. 2. *Ca. 3.* it was enacted, *That every man that compasseth or purposeth the death of the king, or to depose him, or to render up his homage liege, or he that raiseth people, and rideth against the king to make war within his realm, and of that be duly attainted and adjudged in parliament, shall be adjudged as a traitor of high treason against the crown;* and this act is particularly repealed by the statute of 1 H. 4. cap. 10. as a great snare upon the subject; for it is recited, that by reason thereof no man knew *how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason.*

But the true reason was not in regard of the four points [111] themselves, for many of them were treasons within the statute of 25 E. 3. but that wherein the act of 21 R. 2. varied from the act of 25 E. 3. were these: 1. That the compassing to levy war is made treason by the statute of 21 R. 2. whereas the levying of war only was treason by 25 E. 3. Again 2dly, Tho compassing the death of the king was treason within the letter of 25 E. 3. and compassing to depose him was an evidence or overt-act of a compassing of the king's death within the meaning of the act of 25 E. 3. yet both required an overt-act. The statute of 21 R. 2. makes the bare purposing, or compassing, treason, without any overt-act; and tho it restrains the judgment thereof to the parliament, yet it was too dangerous a law to put men's bare intentions upon the judgment even of parliament under so great a penalty, without some overt-act to evidence it: this was one reason of the repeal of the treasons declared by the statute of 21 R. 2. But this was not all, for in that parliament of 21 R. 2. the resolutions of the judges to the questions propounded by the king are entered at large, and received an approbation not only by the suffrage of some other judges and serjeants, but by the statute made in the same parliament, as appears at large by the statute of 21 R. 2. cap. 12. ○

(i) Broke makes this query: "Quare
" vel deprivo, carbone posse depriver, &
" unvere intendere null morte, & pur eis causa
" ne statute fuit ent fuit tempore H. 8. & E:
" 6. Nota." The statutes here referred to
are 26 H. 8. cap. 13. by which it was made
high treason "to wifhe or desire by words or
writing, or to imagine, invente, or attempt
to deprive the king, the queen, or their heirs

" apparent of the dignity, title, or name of
" their royal estates." And 1 E. 6. cap. 12.
by which it was made highly penal (for
the third offense high treason) "to compass
" or imagine by open preaching, express words
" or sayings, to depose or deprive the king,
" his heirs, or successors, kings of this realm,
" from his or their royal estate or titles to or
" of the realm aforesaid."

And

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And therefore, wholly to remove the prejudice that might come to the king's subjects by those rash and unwarrantable resolutions, the statute of 1 H. 4. *Ca. 10.* was made, reducing treasons to the standard of 25 E. 3. and the entire parliament of 21 R. 2. also repealed as appears 1 H. 4. *Ca. 3.*

6. Regularly words, unless they are committed to writing, are not an overt-act within this statute. *Co. P. C. p. 14. (k)*; and the [112] reason given is, because they are easily subject to be mis-taken, or misapplied, or misrepeated, or misunderstood by the hearers (l).

And this appears by those several acts of parliament, which were temporary only, or made some words of a high nature to be but felony. *Co. P. C. cap. 4. p. 37.*: The statute of 3 H. 7. *cap. 14.* makes conspiring the king's death to be felony; which it would not have done, if the bare conspiring without an overt-act had been treason.

26 H. 8. *cap. 13.* malicious publishing by express writing or words, that the king were an heretic, schismatic, tyrant, infidel, or usurper, enacted to be high treason (m).

1 E. 6. *cap. 12.* If any person or persons do affirm or set forth by open preaching, express words or sayings, that the king, his heirs or successors, is not or ought not to be supreme head of the church of *England* and *Ireland*; or is not or ought not to be king of *England*, *France*, and *Ireland*; or do compass or imagine by open preaching, express words or sayings to depose or deprive the king, his heirs or successors from his or their royal estate or titles aforesaid, or do openly publish or say by express words or sayings, that any other person or persons, other than the king, his heirs or successors, of right ought to be kings of this realm; every such offender being convicted, for his first offense shall forfeit his goods, and be im-

(k) *Vide Co. P. C. p. 38, 140.* The passages quoted *S. P. C. 2. b.* from *Brazen* and *Britton*, only describe the form of accusation, but are far from proving that words alone were, in the opinion of those writers, a sufficient evidence of treason; but if they were so at common law, yet it does not follow, that they would be so by the statute of 25 E. 3. which expressly requires the proof of an overt-act, and consequently disallows the evidence of bare words, for words and acts are contra-distinguished from each other. See *Co. P. C. 14. in margin.* The preamble of 1 *Marc.*, *cap. 1. sij. 1.* makes it matter of complaint,

that many bad for words only suffered shameful death.

(l) This is one but not the only reason, for another reason was, because men in a passion or heat might say many things, which they never designed to do; the law therefore required, that in a case of so nice a nature, where the very intention was so highly penal, the reality of that intention should be made evident by the doing some act in prosecution thereof.

(m) This same statute makes it high treason to wish or desire by words or writing to deprive the king of his dignity.

prisoned

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prisoned during the king's pleasure; for the second offense shall lose his goods and the profits of his lands during life, and shall suffer imprisonment during life; and the third offense is made high treason.

But if this be done by writing (*n*), printing, overt-deed, or act, then every such offense is high treason by the act of 25 E. 3.

So much of this act, as concerns any thing in derogation of the papal supremacy, is repealed by the statute of 1 & 2 P. [113] & M. cap. 8. And so much, as concerns treason, farther than it stands settled by 25 E. 3. is repealed by the statute of 1 Mar. cap. 1. *eff.* 1. But the rest of this act, that concerns only misdemeanors, stands perpetual, as it seems.

By 1 & 2 P. & M. cap. 9. Prayers by express words, that God would shorten the queen's days, or take her out of the way, or such like malicious prayer, amounting to the same effect, made treason; but if person penitent upon his arraignment, no judgment to ensue (*o*); the like provision is made during the queen's life by 23 Eliz. cap. 2.

1 & 2 P. & M. cap. 10. Compelling to levy war against the queen, or to depose her or the heirs of her body, and maliciously, advisedly, and directly, uttering such compelling by open preaching, express words or sayings; and also affirming by preaching, express words or sayings, maliciously, advisedly and directly, that the queen ought not to be queen of this realm, is punishable by loss of goods and chattels, whole profits of the offender's lands during life, and perpetual imprisonment; and the second offense is made high treason; but if this be done by writing, printing, or overt-act, then it is made high treason.

1 Eliz. cap. 5. the same act almost *verbatim* for the safety of queen Elizabeth and the heirs of her body.

By 13 Eliz. cap. 1. Compelling the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war against her; and such compelling, maliciously, expressly or advisedly uttered or declared by printing, writing, cyphering, speech, words or sayings;

(*n*) This is said by lord Coke, *P. C.* 14. and in *Sidney's case*, *State Tr.* Vol. III. p. 733. it is said, *scribere est regere; quare tamen*, for if our author argues rightly, that words were not treason by 25 E. 3. *hanc* there needed new acts to make them so in particular cases afterwards, the same argument holds good with respect to

writing, especially if not published; for there were also new acts to make that treason.

(*o*) This last clause extended to such only, who had been guilty during that session of parliament, for the act had a retrospect to the beginning of the session.

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and also malicious, advised and direct publishing and declaring by express words or sayings, that she ought not to be queen, that she is an heretic, schismatic, tyrant, infidel, or usurper, is made high treason in the principal, procurers and abettors (*p*).

[114] 14 Eliz. cap. 1. Compelling to take, or detain, or burn the queen's castles, and such compelling declared by any express words, speech, act, deed, or writing, is made felony; but the actual taking, or with-holding, or burning them, is made treason.

13 Car. 2. cap. 1. Compelling the death of the king or any bodily harm tending to his wounding, imprisonment, or restraint, or to depose him, or to levy war against him, or to stir foreigners with force to invade the kingdom, and such compelling declared by printing, writing, preaching or malicious and advised speaking, is made high treason: publishing or affirming the king to be an heretic or a papist, or that he endeavours to bring in popery; or inciting the people by writing, printing, preaching, or other speaking to hatred of his majesty or the government, disables to hold office (*q*).

By all which it seems, that regularly, 1. words of themselves cannot make high treason; 2. words of themselves are not a sufficient overt-act within the statute of 25 E. 3. to serve an indictment of compassing the king's death.

And with this agrees that notable case of Mr. Pyne in *Croke's reports*, T. 4 Car. (*r*) the words of which are these, "Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his Majesty, that the speaking of the words there mentioned, tho they were as wicked as might be, were not treason; for they resolved, that, unless it were by some particular statute, no words will be treason; for there is no treason at this day, (viz. 4 Car. 1.) but by the statute of 25 E. 3. for imagining the

[115] "death of the king, &c. and the indictment must be framed upon one of the points in that statute; and the words spoken

(*p*) "The indictments and attainders of treason by force of this statute are not more to be followed; because the statute, which made them good, is excepted." *C. P. C. p. 10.* in the margin.

(*q*) No penalties are to be incurred by this act, unless the prosecution be within six months next after the offense committed. See also the 4 Ann. cap. 8. and 6 Ann. cap. 7. whereby it is made high treason to declare by writing or printing, that the queen is not lawful or righful queen, or that any other person hath right to the crown otherwise than according to the acts

of settlement, or that the kings or queens of this realm by authority of parliament are not able to make laws of sufficient force and validity to bind the subjects of the crown: persons who declare the same by preaching or advised speaking incur a punishment, but no prosecution to be for words spoken, unless information be given upon oath before a justice of peace within three days after, and the prosecution be within three months after such information.

(*r*) *Cro. Car. 125.*

"there

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"there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them."

Baker in his *Chronicle*, p. 229. tells us of two very hard judgments of treason given in the time of E. 4. viz. that of *Walter Walker*, dwelling at the sign of the *crown* in *Cheapside*, who told his little child if he would be quiet, he would make him heir of the *crown*: the other of *Thomas Burdett* (f), who having a white buck in his park, which in his absence was killed by E. 4. hunting there, wished it, horns and all, in his belly that counselled the king to kill it; whereas in truth none counselled him to it, but he did it of himself: for these words both these were attaint of high treason, and executed: tho *Markham chief justice* rather chose to leave his place, than assent to this latter judgment. *Vide* indictment of treason for treasonable words, P. 3 H. 4. Rot. 4. & 12. *Walton's case* and *Southe's case* (g).

Therefore tho this be regularly true, that words alone make not treason or an overt-act, yet it hath these allays and exceptions.

(1.) That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expositive of such a compassing, as may plainly appear by many of the precedents there cited (h).

(2.) That some words, that are expressly menacing the death or destruction of the king, are a sufficient overt-act to prove that compassing of his death, M. 9 Car. B. R. *Crohagan's case* in [116] *Croke* (x), who being an *Irish* priest, 7 Car. 1. at *Lisbon* in *Portugal* used these words, "I will kill the king (innuendo dominum *Carolum regem Angliae*) if I may come unto him," and in Aug. 9 *Caroli* he came into *England* for the same purpose (y). This was proved upon

(f) See *Rapin's history sub anno 1478.* who mentions it in the same manner; but it appears from the indictment in *Cro. Car. 120.* that he was indicted for calculating the king's and prince's nativity, and declaring that they would not live long; and also for publishing seditious rhimes and ballads, altho this was not treason, and was therefore made felony during queen *Elizabeth's life*, by 23 *Eliz. cap. 2. Co. P. C. 6.*

(g) *Louth's* (not *Soub's*) and *Walton's case* are *Trin. 3 H. 4. coram rege rot. 4.* and *P. 3 H. 4. coram rege rot. 12.* in *Sperbank's*

case, who was also convicted of treason for scandalous words.

(h) In *Pyne's case*.

(x) *Cro. Car. 332.*

(y) This case does by no means prove, that words alone are a sufficient overt-act, for here were not only threatening words, but also an act done in order to put that threatening in execution; so that, as our author admits, it comes more properly under the former head; the resolution therefore in *Kelyng 13.* that words are an overt-act, which is founded on this case, must fall to the ground.

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his trial by two witnesses, and for that his traitorous intent and the imagination of his heart was declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 E. 3. and accordingly he was convicted, and had judgment of high treason; yet it is observable, that there was somewhat of an overt-act-joined with it, namely, his coming into *England*, whereby it seems to be within the former consideration, namely, tho the coming into *England* was an act indifferent in itself, as to the point of treason; yet it being laid in the indictment, that he came to that purpose, and that in a great measure expounded to be so by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpose, and accordingly applicable to that end.

To say that the king is a bastard, or that he hath no title to the crown, is held high treason. *M. 5 Jac. Yelvert.* 197. *Blanchflower's case,* & *ibidem Hill.* 8 *Jac. Berisford's case* (n).

[117] *P. 13 Jac. B. R.* (a) John Owen alias Collins was indicted of treason, for that he, intending the king's death, false & malitiosē spake these words of the king: *The king being excommunicate by the pope may be lawfully deposed, and killed by any whatsoever, which killing is not murder;* and being demanded by Henry White, how he durst utter such a bloody and fearful conclusion, Owen answered, *The matter is not so heinous, as you suppose, for the king being the less is concluded by the pope being the greater; and it is all one as a malefactor being convicted by a temporal judge is delivered to execution, so the king being convicted by the pope may be lawfully slaughtered by any whatsoever, for this is the execution of the supreme sentence of the pope, as the other is the execution of the law:* to this indictment he pleaded not guilty; and it was ruled to be high treason by Coke chief justice and all the Court; and being found guilty he had judgment to be hanged, drawn and

(n) This case is likewise reported *Cro. Jac.* 275, and *a Bell.* 147. but both the cases quoted here by our author, were actions for scandalous words, and the single point in judgment before the court was, whether the words were actionable, and even as to that *Tilverton* and *Croke* in *Berisford's case* differed from the other judges; so that none of these cases prove, that bare words are an overt-act of treason within 25 Ed. 3. indeed where any one not only utters words declaring his own thoughts,

but endeavours by promises of reward or other arguments to persuade another to kill the king, or the like, this has been construed an overt-act of treason, because here is something besides the words, here is an attempt to draw another into the design, and is as much an overt-act as an agreement or a consultation how to effect it. *Lord Stafford's case, State Tr. Vol. III. p. 208. Charnock's case, State Tr. Vol. IV. p. 581. a Bell. 631.*

(a) *a Bell. Rep. 185.*

quartered (*b*). And here it was said by the king's attorney (*c*) upon the evidence, and not denied by the court, 1. that the statute of 25 E. 3. as to compassing the king's death was but an affirmation of the common law. 2. That it is treason by the laws of all nations; and therefore an embassador for compassing the king's death shall be executed here for treason; but for other treasons shall be remitted into his own country to be tried. 3. That words of this nature spoken *de futuro* have been adjudged high treason presently; and therefore it was there said to be adjudged in the time of H. 8. in the case of the duke of Bucks, that these words were high treason, *If the king should arrest him of high treason, he would stab him*; (*vide case de duke Bucks, 13 H. 8. 11. b. 12. a.* where there are other words also (*d*);) and in the case of another, *If H. 8. will not take again queen Catherine as his wife, he shall not be king* (*e*); and in the case of Stanley, [118] *Temp. H. 7. That if Pierce Warbeck were the son of E. 4. he would take part with him against H. 7.* (*f*).

And note, that king James had been long excommunicate by the pope, and that every *Maunday Thursday* the pope excommunicates all *Calvinists, &c.* and all that have withdrawn their obdience from the pope: *Owen* was executed accordingly. *Vide la* (*g*) the whole judgment and particulars and consequence thereof.

(*b*) These words, tho' very wicked and of a mischievous tendency, and therefore an high misdemeanor, yet unless accompanied with some circumstances to shew that they were made use of in order to persuade somebody to kill the king, cannot according to the resolution in *Pyses* case amount to an overt-act of high treason, for they are not any act at all, and besides might be said by a bigotted papist, in the height of his ignorant zeal, without intending or imagining the death of the king.

(*c*) *Bacon.*

(*d*) There was also somewhat of an overt-act joined with the words; for being told by a monk, that he should be king, and commanded to obtain the good will of the commonalty, he was accused of giving certain robes for that intent: this duke's case was counted hard, and his fate is lamented by the reporter.

(*e*) This was the case of *Elizabeth Barton*, the holy maid of *Kene*; the words as related by lord *Bacon* in his history of *Henry VII. p. 134.* were these; *"That if king Henry the eighth did not take Catharine his wife again, he should be deprived of his crown, and die the death of a dog."* She and her accomplices were attainted of

treason by a particular act of parliament, viz. 25 H. 8. cap. 22. upon which lord *Coke* observes, *Co. P. C. 14.* that they could not have been attainted of treason within 25 E. 3.

(*f*) Lord *Bacon* in his history of *Henry VII. p. 134.* reports, that the criminal words, for which *Stanley* was accused, were these; *"That if he was sure, that the young man (Perkin Warbeck) were king Edward's son, he would never bear arms against him."* Upon which the historian makes this observation; *"This case seems somewhat an hard case, both in respect of the conditional, and in respect of the other words, &c."*—But (says he) *"Some writers do put this out of doubt; for they say, that Stanley did expressly promise to aid Perkin, and sent him some help of forces."* And it appears by the record of *Stanley's* indictment quoted in *Co. Car. p. 123.* that he was accused not only of words, but of an express agreement and conspiracy to bring in *Peter Warbeck* and make him king. Note, That the lord *Bacon*, whose history is here quoted, is the attorney general mentioned in *Owen's* case.

(*g*) *I. R. Rep. 185.*

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7. Those words, which being spoken will not make an overt-act to make good an indictment of compassing the king's death; yet, if they are reduced into writing by the delinquent either letters or books, and published (*h*), will make an overt-act in the writer to make good such an indictment, if the matters contained in them import such a compassing (*i*). Co. P. C. p. 14.

Instances of this kind are many in 4 *Car. Croke*, ubi supra: but I shall instance particularly only in *Williams's case*, P. 17 *Jac. B. R.* (*k*).

[119] *Williams* wrote a book, intitled *Balaam's Aſi* (*l*), in which there were many things reproachful and dangerous to the king, and among others, that the king should die anno domini 1621. and that the realm should be destroyed, because it was anti christian and the abomination of desolation: this book he inclosed and sealed up in a box, and sent it to the king (*m*); and for this he was indicted and attainted and executed for high treason, vide Co. P. C. 14. concerning words, where it is said thus: "But if the same be set down in writing by the delinquent himself, this is a sufficient overt-act within this statute." And the same law it is, if it be set down in writing by any other by his command or direction.

8. If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death. This was *Arden's case* (*n*), 26 *Eliz.* and accordingly it was ruled *Decem. 14 Caroli at Newgate* in the case of *Tonge* and other confederates (*o*).

By my lord *Coke's* opinion, Co. P. C. 14. "A conspiracy to levy war is no treason by the statute of 25 E 3. till war be levied;"

(*b*) In *Peacham's* case quoted in *Car. 125.* an unpublished writing was admitted in evidence as an overt-act of treason; the like in the case of *Col. Sidney*, *State Tr. Vol. III.* p. 710. but both those cases were unwarrantable; as to the first it does not appear there was any judgment, for the book says it was against the opinion of many of the judges, and the latter was resolved at a time of day, when the resolution of the judges in such an affair ought to be but little regarded; that judgment was accordingly reversed by act of parliament, *I W& M.*

(*i*) As was *Twyn's* case, *Kelyng* 22. for report says, that the people were exhorted by that book to put the king to death. *State Tr. Vol. 2. p. 524.*

(*k*) This case (which seems a very hard

one) is reported, a *Rol. Rep.* 88. and is quoted, *Car. 125.*

(*l*) He wrote two books, one called *Balaam's Aſi*, and the other *Speculum Regale*.

(*m*) In this case was first broached that famous doctrine, *scribere est agere*. The court went so far as to declare it to be their opinion, that if this book had been found in his study, it would have been a sufficient evidence of the treason, for which he was indicted; but this case destroys its own authority by going too far, for they agreed it to be a clear point, that bare words might amount to treason; strange construction of the statute of 25 Ed. 3.

(*n*) *Anderson*, pars 1. p. 104.

(*o*) *Kelyng* 17. *State Tr. Vol. II.* p. 474.

and

and there have been several particular and temporary acts, that make the conspiracy to levy war treason, as well as compassing the king's death. And therefore he saith, " That it hath been resolved, 35 Eliz. " that conspiracy to levy war against the king shall not be said an " overt-act, to serve an indictment for the compassing the king's death, " because the clauses concerning compassing of the king's death, and that " of levying war, are distinct clauses, and declare distinct treasons; and " therefore the latter shall not be an overt-act to serve the former, be- " cause this were to confound several classes or *membra dividentia* of " high treason."

And yet in the same book, p. 12. the case of the earls of [120] *Essex* and *Southampton*, 43 Eliz. are cited, which seem to contradict that opinion : the words are, " That the said earls intended to " go to the court where the queen was, and to have taken her into their " power, and to have removed divers of her council, and for that end " did assemble a multitude of people; this being raised to the end afore- " said was a sufficient overt-act for compassing the death of the queen;" which seems to contradict what is elsewhere by him said (p).

And he that shall read the proceeding against the duke of *Norfolk* set forth at large by *Camden Eliz. sub anno 1572.* p. 170. & sequen-*tibus*, will find, that not only the conspiring with a foreign prince to invade this kingdom, and signifying it to him by letters, is an overt-act to maintain an indictment for compassing the queen's death: but that the duke's purpose to marry the queen of *Scotland*, who had formerly laid claim to the crown of *England*, and signifying it by letters, and all this done without the consent of the queen of *England*, was held an overt-act to depose the queen of *England*, and to compass her death ; for if the queen of *Scots* claimed the crown of *England*, he, that married her, must be presumed to claim it also in her right, which was not consistent with the safety of the queen of *England*, and her title to the crown ; and altho this extending of treason (as to this point of marriage) by illation and consequence was hard (q); yet the duke was convict and attaint of treason generally upon this indictment, tho there are likewise some other crimes charged in the indictment.

(p) I do not see how this contradicts what is said by lord Coke, p. 14. for here was an express design to put the person of the queen under a force; nay it had proceeded farther than a design, for there was a multitude actually assembled for that end.

State Tr. Vol. I. p. 190.

(q) According to lord Coke's understand- ing of the statute of 25 Ed. 3. it was not only hard but illegal, for by that statute no one ought to be convicted by inference or illation. *Coke. P. C. p. 12.*

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I will therefore set down the resolutions of the judges 1663. touching those, that were assembled in *Yorkshire* at *Farley Wood* (r), divers of whom were after indicted, and attainted of high treason for [121] compassing the death of the king: the resolution was in these words, as I have transcribed it *verbatim* out of a *MS.* of my lord keeper *Bridgman* then chief justice of the *C. B.* who was present at the conference, *Fuit agree par les justices sur conference touchant ceux, queux assemble eux in Farley Wood in Yorkshire 1663, que sur indictment pur compassing mort le roy overt fait poest estre layd in consulting a levier guerre contre lui (que est overt-act de soy mesme) & actual assembling, & levying guerre: Et ou Co. P. C. 14. dit,*

"Qe conspiracy a levier guerre nest treason, tanque soit levied, & pur ceo nest overt-act, ou manifest proove de compassing mort le roy, car le parols sont, (de ceo) i. e. compassing mor le roy, & ceo soit a confounder le several classes, ou membra dividentia:" Uncor le ley est contra; & issint fuit resolve per tous les justices & councel de roy in le case des regicides, Venner, Tonge & Vane (s), qe sur indictment de compassing de mort le roy, consulting a levier guerre, ou actual assembling de guerre fueront evidence, & overt faits provant compassing mort le roy; & ceo appeirt in Co. P. C. 14. "Si subiect conspire ove forein prince de invader le realm, & prepare pur ceo per overt fait, ceo est sufficient overt-act pur mort le roy: Et ibidem p. 12. "Le count de Essex & South' intended daler al court, & daver prise la reigne en lour power, & remover ascum de councel, & a ceo fine assembled multitude de people; this being raised for the end aforesaid fuit sufficient overt-act pur compassing de mort le roy," queux 2 cases sont expresse contrary al primer.

Fuit aussi agree, que si un overt-act soit lay en le enditement, & le proof est dun autre overt-act de mesme le kinde, ou species de treason, ceo est asses bone evidence.

I must confess, that I could never assent to this last part of the resolution: tho I know it was so practised in criminal cases in the star-chamber, for I have always thought, 1. That the overt-act is an essential part of the indictment. 2. As it must be laid, so it must be proved (t); for otherwise, if another act than what is laid should be [122] sufficient, the prisoner would never be provided to make his defense. 3. That more overt-acts than one may be laid in

(r) *Kelyng* 19.

(s) *Kelyng*, 20, 21.

(t) *Kelyng* 8. is *contra*, however this point is put out of all doubt by 7 *W. 3.*

cap. 3. §. 8. whereby it is provided, that no evidence shall be given of any overt-act, which is not expressly laid in the indictment.

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an indictment, and then the proof of any of them so laid, being in law sufficient overt-acts, maintains the indictment. 4. That if any overt-act be sufficiently laid in the indictment, and proved, any other overt-acts may be given in evidence to aggravate the crime and render it more probable.

This resolution, as to the point of compassing the king's death, being the latter and of great weight, and more than twice practised (^s), ought to out-weigh the opinion before cited, and with this agrees the resolution of 13 Eliz. Dyer 298. b. in Dr. Storie's case, who conspired with a foreign prince to invade this realm; it was adjudged an overt-act to make good an indictment of compassing the queen's death (^x). *Vide Anderson's Reports Placito* 154. which was the case of Arden and Somerville and others, who conspired the death of queen Elizabeth, resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it, as well as Somerville's buying of a dagger actually to have executed it. *Anderson's Rep. Pars I.* p. 104.

And yet this difference seems to me agreeable to law, and reconciles in some measure both resolutions.

An assembly to levy war against the king, either to depose or restrain, or enforce him to any act, or to come to his presence to remove his counsellors or ministers, or to fight against the king's lieutenant or military commissionate officers, is an overt act [123] proving the compassing of the death of the king; for such a war is directed against the very person of the king, and he, that designs to fight against the king, cannot but know, at least, it must hazard his life; such was the case of the earl of Essex and some others.

(^s) But yet it does by no means follow from thence, that this resolution is right as to this point any more than as to the other resolved at the same time, which yet our author thinks to be wrong; were it a point of common law the repeated resolutions of the judges is the only way to know what the law is; but where the question arises upon an act of parliament, that is to be the rule for courts of justice to go by, of which they are to judge according to their own reason and understanding, and are not in such cases tied down by former determinations any farther than the reasons or arguments thereof appear conclusive,

for *judicandum est legibus non exemplis. Co-P.C. 6. in margine.* A bare conspiracy to levy war is certainly not treason, and was so adjudged in the case of Sir John Friend; but if it appears upon evidence, that the design was to kill the king, or depose him or imprison him, or put any force on him, and the levying war was only the way or method made use of to effect that design, then it will be an overt-act of compassing the death of the king; and this is the distinction taken by lord chief justice Holt in Sir John Friend's case, *State Tr. Vol. IV. p. 613, 614.*

(^x) See 2 Tent. 315.

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But if it be a levying of war against the king merely by interpretation and construction of law, as that of *Burton* (y), and others, to pull down all enclosures, and that of the apprentices in *London* lately, to pull down all bawdy-houses (z), *de quibus infra*, this seems not to be an evidence of an overt-act to prove compassing the king's death, when it is so disclosed upon the proof, or if it be so particularly laid in the indictment; tho *prima facie* if it be barely laid as a levying war against the king in the indictment, it is a good overt-act to serve an indictment of compassing the king's death, till upon evidence it shall be disclosed to be only to the purpose aforesaid, and so only an interpretative or constructive levying of war. And *Burton's case* 39 *Eliz.* seems to intimate as much, because they took him to be indictable only upon the Statute of 13 *Eliz. cap. 1.* for conspiring to levy war against the queen, whereas if this had been an overt-act to prove the compassing of the death of the king, the fact had been treason within 25 *E. 3.* as surely it would have been, if he had conspired to have raised a war directly against the king or his forces, and assembled people for that purpose, tho an actual war had been caused by him.

But such a levying of war may in process of time rise into a direct war against the king; as if the king send his forces to suppress them, and they fight the king's forces; and then it may be an overt-act to prove the compassing of the king's death.

And thus far of compassing the king's death.

Something I shall add touching the compassing of the death of the queen, or prince, wherein I shall first consider, what shall be said the queen, or their eldest son within this act. 2. What a compassing of their death.

I. A queen dowager, namely the queen after the death of [124] her husband, is not a queen within this act, for tho she bear the title of queen, and hath many prerogatives answering the dignity of her person, yet she is not (*his queen*) or, as the other parts of the act express it, (*his companion*) it must be the queen consort, the king's wife, and during the marriage between them.

2. The queen divorced from the king *a vinculo matrimonii*, as for cause of consanguinity, is not a queen within this act, tho the king be living: this was the case of queen *Katharine*, who was first married to prince *Arthur*, and by him, as was said, carnally known, and

after his death married to prince *Henry* (afterwards king *Henry VIII.*), by whom she had issue *Mary* (afterward queen of *England*), and afterwards after twenty years marriage was divorced *causa affinitatis*, which divorce was confirmed in the parliament 25 *H. 8. cap. 22.*

This was also the case of his second wife queen *Anne*, who was also divorced *a vinculo*, and that divorce confirmed by the statute of 28 *H. 8. cap. 7.* which nevertheless was again repealed in part by the statute of 35 *H. 8. cap. 1.* and in effect wholly by the statute of 1 *Eliz. cap. 3.* and yet there is one clause observable in the act of 28 *H. 8.* that treasons committed against queen *Anne*, or the lady *Elizabeth* her daughter, mesme between the marriage and that divorce were punishable, altho the divorce made a nullity of the marriage; and therefore there is a special clause to pardon all such treasons, so that the relation of the divorce, and separation to dissolve the marriage *ab initio*, was not thought sufficient to discharge those treasons, without a special pardon discharging the treasons committed against them.

But we need not put the case of a divorce *a mensa & thoro causa adulterii*, because adultery by the king's wife is high treason in her, and so the case of a divorce cannot well come in question, for she must be executed for treason. *P. 28 H. 8. Spilman's Rep. (a). 33 H. 8. cap. 21. (b). Co. P. C. p. 9.*

II. *Ou lour fiz eigne & heir.*

At common law compassing the death of any of the king's [125] children, and declaring it by overt-act was taken to be treason, *Britton, ubi supra*; but by this act it is restrained to *the eldest son and heir.*

1. *The eldest son and heir* extends not to a collateral heir, tho declared heir apparent to the crown, unless there be a special provision for that purpose by act of parliament: thus *Roger Mortimer 11 R. 2. Richard duke of York 39 H. 6. John de la Poole tempore R. 3. and Henry marquis of Exeter tempore H. 8.* were declared heirs apparent of the crown; yet compassing any of their deaths in the king's lifetime was not treason within this act. *Co. P. C. 8, 9.*

And therefore in that great agreement made in the parliament of 39 *H. 6.* when *Richard duke of York* made his claim to the crown, and it was enacted, that *H. 6.* should hold the crown during his life, and that *Richard duke of York* should succeed him, *Rot. Parl. 39*

(a) In the case of queen *Anne Boleyn.*
Howard.

(b) In the case of queen *Katherine.*

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H. 6. n. 24. it is specially enacted, that if any person do compass or imagine the death of the duke, and thereof be attaint by open act, it shall be high treason; which had not been so, unless it had been especially enacted.

2. The king takes wife, and by her hath issue two sons, the eldest dies, the wife dies, he takes a second wife; this second son, tho he were once not eldest, and tho he be not *leus eius regis filius*, but only the king's son, is eldest son within this statute.

3. King Edward III. had issue the *Black Prince*, who had issue *Richard of Burdeaux* afterwards king *Richard II.* his eldest grandchild, tho he were not, in the life of his father the *Black Prince*, the king's eldest son within this statute, yet his father being dead in the life of *Edward III.* it may be very considerable whether prince *Richard* be the king's eldest son within this statute, and the compassing of his death be high treason; for he is heir apparent of the crown, and his heirship cannot be devested by any after born child.

The duchy of *Cornwall* was settled upon the *Black Prince & ipsius & haeredum suorum regum Anglie filii primogenitus*, altho [126] the king's eldest daughter be not duchess of *Cornwall*, because not *filius*, yet, (contrary to the opinion delivered in the prince's case 8 Co. Rep. 30. a) *H. 8.* after the death of his brother prince *Arthur*, and our late king *Charles*, after the death of his eldest brother prince *Henry*, were dukes of *Cornwall* in the life of their fathers: the latter appears expressly by the statute of 21 *Jac. cap. 29.* wherein it is so declared by judgment of parliament; and *Richard of Burdeaux* was also duke of *Cornwall* after the death of his father the *Black Prince*, and comes in the catalogue of dukes of *Cornwall* in the collection of *Vincent and Mills* of the nobility of *England*; and had the revenues thereunto belonging, as appears undeniably. *Rot. Parl. 51 E. 3. n. 65.*

But it seems it was not by virtue of that limitation in the grant to the *Black Prince*, but by a new special creation; for *Rot. Parl. 50 E. 3. n. 50.* the commons petition, that he might be created duke of *Cornwall*, earl of *Chester*, and prince of *Wales*; the king declined the doing of it at their request, as being a thing proper only for the king to do his pleasure therein: the truth is, the king had done it before the request made, viz. *Rot. Cart. 47, 48 & 49 E. 3. n. 10.* the words of the charter are, “*Ex confilio & consensu prælatorum, ducum, comitum & baronum, ipsum Ricardum principem Wallia, ducem*

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"ducem Cornubiæ, & comitem Cestræ fecimus & creavimus," and grants him the possessions therunto belonging, which he accordingly enjoyed: *vide Rot. Parl. 51 E. 3. n. 9.* and observe a certain estate is limited by the patent of creation for life; or otherwise, it seems, it was thought fit to leave it to the construction of law, whether he had it purely by a new creation, or by the construction of the charter 11 E. 2. to the *Black Prince*.

This case therefore touching conspiring the death of such a prince, as *Richard of Burdeaux* then was, tho' it may be probable to be treason within the intent of this act, is fittest to be first decided by parliament according to the caution used in the statute of 25 E. 3.

3. If the king of *England* hath two daughters only, and no son, the eldest daughter is not within the words or intent of the *king's eldest son* within this clause, for a son may be after [127] born; but several statutes have made temporary provisions in this case: *vide* the statutes of 25 H. 8. cap. 22. 28 H. 8. cap. 7.

It is true the implication of *Co. P. C. p. 9.* where it is said, "If the heir apparent be collateral heir apparent, he is not within this statute, until it be declared by parliament," implies that the lineal heir, male or female, is within this statute.

But the implication of the statute itself is against it, because this act almost in the same breath takes notice of the king's eldest daughter upon another rank of treason, namely defiling her; and it is not safe to extend this act by construction.

The second daughter, living the first, is certainly not within this law, because not immediately inheritable to the crown.

Yet by the statute of 25 H. 8. cap. 22. which was but temporary, provision is made, that if any thing should be written or done to the peril, slander or disherison of any of the issues and heirs between him and queen *Anne*, the same should be treason.

Thus far touching the persons of the queen or prince.

Now what shall be said a compassing of their death, or an overt-act to prove the same: what shall be said a compassing of the king's death, hath been at large declared, much whereof may be applied to the queen or prince, but not univerſally; for the king is above the coercion of the law, tho' his actions are not exempted from the direction of the law in many cases; but the queen and prince are subjects of the king, and subject to the laws; whence it comes to pass, that there are certain overt-acts manifesting compassing the king's death,

death, which are specifical and appropriate to the king and his sovereign power and royal dignity, which are not applicable to the queen or prince.

If a man compass to imprison the king, tho it be colourably done by process of law, it is a compassing of the king's death within this act, as hath been shewn.

But if the queen or prince commit a misdemeanor of such a nature, as is a contempt against the king's laws, to which imprisonment is proper, as in case of treason, felony, rescue, they [128] may be imprisoned by process of law without danger of treason: thus was the son of *Henry IV.* committed by *Gascoign* chief justice for rescuing a prisoner from the bar; and several acts of attainder of treason have passed in parliament against some queen-conorts, as appears by 28 *H. 8. cap. 7.* 33 *H. 8. cap. 21.* against queen *Catharine Howard.* *Rot. Parl.* 5 *H. 6. n. 11.*

Again, to compass to depose the king is treason, but to compass a divorce between the king and queen by the king's commission by due process of law was no treason, as appears in the process before the archbishop of *Canterbury*, whereupon queen *Catherine*, and afterwards queen *Anne* were divorced.

The compassing therefore of the death of the queen or prince, which is treason within this act, is where a man without due process of law expressly compasseth the wounding or death of them either by force or poison.

And thus much for treason in compassing the death of the king, queen, or prince; and because the next treason declared, namely the violation of the king's wife, the king's eldest son's wife, the king's eldest daughter, hath not much to be said concerning it, I shall close this chapter with it.

1. *The violating the king's companion*, that is the king's wife, the queen consort, her husband being now living; this is high treason, and so it is in her if she consent. *P. 28 H. 8. 33 H. 8. cap. 21. Co. P. C. p. 9.*

2. *The wife of the king's eldest son and heir*, a princess consort, and during the coverture between them; and if she consent, it is treason in her.

3. *The king's eldest daughter not married*: this extends to a second daughter, the eldest being dead; for she is now eldest, and, for want of issue male, inheritable to the crown; but at common law this

this treason extended to any of the daughters. *Britton, cap. 22. §. 71.* It extends to an eldest daughter, tho there be sons; and *quære*, whether to an eldest daughter, that hath been married, and is now a widow, *nient marry* may be construed either way; or if it doth, yet whether it extends to an eldest daughter, that is a widow, and hath children by her husband; the words of the old books [129] are *avant ces, qel est marry*: it seems, that if the eldest daughter hath been once married, she is not within this law, because of the words *nient marry*, tho the reason may possibly be the same; and it seems, tho there be sons, yet the violating of the king's eldest daughter, being within the express words of the law, the violation of her is within this law, because within the words; and yet the violation of the wife of the king's second son is not within this statute, yet he and his issue is inheritable to the crown before the eldest daughter; in this case therefore the words of the law are to govern.

Altho it should seem probable, that the eldest son of the prince after the death of his father may be the king's eldest son within this act, as is before observed; yet the daughter of the king's eldest daughter, after her mother's death, seems not an eldest daughter within this act, her grandfather being living, for the grandson, who is heir apparent of the crown, is of more consideration than the daughter of a daughter, who cannot be heir apparent, because a son may be born.

Quære, Whether violating the eldest daughter, after the death of the king her father, be treason within this act, where a son succeeds to the crown: it seems not, for the relation is ceased (c).

And thus far for the two first branches of high treason.

(1) Blackf. Com. ch. vi. page 76; Co. Lit. 133. b. 1 Hawk. P. C. 34, 36, 37. Moore, 620. 2 Vent. 316. Bro. Treason, pl. 24. Co. P. C. 7. Foss. 397, 400, 403. Kelyng. 8. 12. 13. pl. 19.

(c) She is no longer *leigne file le roy*. It of course that the eldest son and eldest having been before observed that a queen daughter of such a queen is likewise within regent is a king within this act, it follows it. Co. P. C. p. 8.

C H A P. XIV.

Concerning levying of war against the king.

THE *jus gladii*, both military and civil, is one of the *jura maiestatis*, and therefore no man can levy war within this kingdom without the king's commission. *C. P. C.* p. 9. See the statute, or rather proclamation (*a*) *de defensione portandi arma*, wherein it is recited by the king, that the prelates, earls, barons, and commonalty *illegitae assembles en avisement sur ceut besoigne nous eout dit, que a nous appent & de nous par nostre royal seignorie defendre fortement des armes, & de tout autre force contre nostre pees, a tous les foitz, que nous plerra (b)*; and hence it is in all declarations and indictments touchings things done against the peace, the conclusion goes *contra pacem domini regis*.

It is true, there have been great disputes in this kingdom touching the disposition of the *militia* of this kingdom, which are now all settled, and declared to be the right of the crown by the statutes of 13 Car. 2. cap. 6. and 13 & 14 Car. 2. cap. 3.

Now as to this clause of high treason, *Ou si home levy guerre contre nostre seigneur le roy en son realme.*

To make a treason within this clause of this statute there must be three things concurring.

I. It must be a *levying of war*.

II. It must be a *levying of war against the king*.

III. It must be a *levying of war against the king in his realm*.

I. For the first of these, the act saith *levy guerre*; what shall be said a *levying of war*, is in truth a question of fact, and [131] requires many circumstances to give it that denomination, which may be difficult to enumerate or to define; and commonly is expressed by the words *more guerrino arraiati*.

As where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march *cum*

(a) In the seventh year of Edward I. against coming armed to the parliament.

(b) This statute is only a proof of the king's power to issue his proclamation *Vide Rot. Parl. 15 E. 3. pars 1. n. 48.*

cum vexillis explicatis or with drums or trumpets, and the like ; whether the greatness of their numbers, and their continuance together doing these acts may not amount to *more guerrino arraiati*, may be considerable.

But a bare conspiracy or consultations of persons to levy a war, and to provide weapons for that purpose ; this, tho it may in some cases amount to an overt-act of compassing the king's death, yet it is not a levying of war within this clause of this statute ; and therefore there have been many temporary acts of parliament to make such a conspiracy to levy war treason during the life of the prince, as 13 Eliz. cap. 1. 13 Car. 2. cap. 1. and others. *Vide* accordant Co. P. C. p. 10.

Again, the actual assembling of many rioters in great numbers to do unlawful acts if it be not *modo guerrino* or *in specie belli*, as if they have no military arms, nor march or continue together in the posture of war, may make a great riot, yet doth not always amount to a levying of war : *vide* Statute 3 & 4 E. 6. cap. 5. 1 Mar. cap. 12. (c).

II. As to the second ; the statute saith, (*against us*) to make it therefore treason, it must be a levying of war against the king : otherwise, tho it be *more guerrino*, and a levying of war, it is not treason.

I. Therefore if it be upon a private quarrel, as many times it happened between lords marchers, tho it be *vexillis explicatis*, it seems no levying of war against the king. 2. If it be only upon a private and particular design, as to pull down the inclosures of such a particular common, it is no levying of war against the king. Co. P. C. p. 9.

3. But a war levied against the king is of two sorts, 1. Expressly and directly, as raising war against the king or his general and forces, or to surprise or injure the king's person, or to [132] imprison him, or to go to his presence to enforce him to remove any of his ministers or counsellors, and the like. 2. Interpretatively and constructively, as when a war is levied to throw down inclosures generally, or to infringe servants wages, or to alter religion established by law ; and many instances of like nature might be given ; this hath been resolved to be a war against the king, and treason within this clause ; and the conspiring to levy such a war is treason, tho not within the act of 25 E. 3. yet by divers temporary acts of parliament, as 13 Eliz. during the queen's life, 13 Car. 2. during our king's life. Co. P. C. p. 10.

(c) See also 1 Geo. 1. cap. 5.

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The first resolution, that I find of this interpretative levying of war, is a resolution cited by my lord Coke, *P. C.* p. 10. in the time of *Henry VIII.* for inhabiting servants wages; and the next in time was that of *Burton*, 39 *Eliz. Co. P. C.* p. 10. (*d*) for raising an armed force to pull down inclosures generally: this is now settled by these instances, and some of the like kind hereafter mentioned; the proceeding against *Burton* and his companions was not upon the statute of 25 *E. 3.* which required, that in new cases the parliament should be first consulted; but upon the statute of 13 *Eliz.* for conspiring to levy war, which hath not that clause of consulting the parliament in new cases, and therefore seems to leave a latitude to the judges to make construction greater, than that was left by the statute of 25 *E. 3.*

These resolutions being made and settled we must acquiesce in them; but in my opinion, if new cases happened for the future, that have not an express resolution in point, nor are expressly within the words of 25 *E. 3.* tho they may seem to have a parity of reason, it is the safest way, and most agreeable to the wisdom of the great act of 25 *E. 3.* first to consult the parliament and have their declaration, and to be very wary in multiplying constructive and interpretative treasons, for we know not where it will end.

But particular instances will best illustrate this whole learning, which I shall subjoin, tho somewhat promiscuously, as they occur to my memory.

[133] A conspiring or compassing to levy war is not a levying war within this act, unless the war be levied; this appears, *Co. P. C.* p. 9. and also by those many acts of parliament above-mentioned, which were but temporary and limited to continue during the life of the king or queen, whereby it is specially enacted, that such compassing to levy war shall be treason; which needed not have been, if it had been treason by the statute of 25 *E. 3.* *Vide 1 & 2 P. & M. cap. 10. 1 Eliz. cap. 5. 13 Eliz. cap. 1. 13 Car. 2. cap. 1.*

And therefore in the case of *Robert Burton* and others, that conspired to assemble themselves and pull down inclosures, and to gain arms at the lord *Norris's* house, and to arm themselves for that purpose, *Co. P. C.* 10. they were indicted and attainted purely upon the statute of 13 *Eliz. cap. 1.* whereby conspiring to levy war is made treason,

But if divers conspire to levy war, and some of them actually levy

(d) *Popl. 122. 2. Whist, 363.*

it, this is high treason in all the conspirators, because in treason all are principals, and here is a war levied (*e*).

If divers persons levy a force of multitude of men to pull down a particular inclosure, this is not a levying of war within this statute, but a great riot; but if they levy war to pull down all inclosures, or to expulse strangers, or to remove counsellors, or against any statute, as namely the statute of *Labours*, or for inhabiting salaries and wages, this is a levying war against the king, because it is generally against the king's laws, and the offenders take upon them the reformation, which subjects by gathering power ought not to do. *Co. P. C.* p. 9, 10. *Vide* the act 3 & 4 E. 6. cap. 5. "If any to the number of twelve shall intend, go about, practise, or put in ure by force to alter the religion established by law, or any other laws, and de- part not within an hour after proclamation, or after that shall wil- fully in a forcible manner attempt to put in ure the things above specified, then it is high treason."

If men levy war to break prisons to deliver one or more particular persons out of prison, wherein they are lawfully imprisoned, [134] unless such as are imprisoned for treason; this upon advice of the judges upon a special verdict found at the *Old Bailey*, was ruled not to be high treason, but only a great riot 1668. but if it were to break prisons, or deliver persons generally out of prison, this is treason, *Co. P. C.* p. 9.

There was a special verdict found at the *Old Bailey*, anno 20 Car. II. (*f*), that *A. B.* and *C.* with divers persons to the number of an hundred assembled themselves *modo guerrino* to pull down bawdy-houses, and that they marched with a flag upon a staff, and weapons, and pulled down certain houses in prosecution of their conspiracy; this by all the judges assembled, except one (*g*), was ruled to be levying of war, and so high treason within this statute; and accordingly they were executed.

But the reason that made the doubt to him that doubted it, was 1. Because it seemed but an unruly company of apprentices, among whom that custom of pulling down bawdy-houses had long obtained, and therefore was usually repressed by officers, and not punished as traitors. 2. Because the finding to pull down bawdy-houses might reasonably be intended two or three particular bawdy-houses, and the

(*e*) *Co. P. C.* p. 9 *Kelyng*, p. 19.
(*f*) *Vide Kelyng*, p. 70. &c.

(*g*) This was our author himself. *Vide Kelyng*, 75.

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indefinite expression should not *in materia odioſā* be construed either universally or generally. And 3. Because the statute of 1 Mar. cap. 12. though now discontinued, makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together an hour after proclamation made; as namely an assembly to pull down bawdy-houses, burn mills or bays, or to abate the rents of any manors, lands or tenements, or the price of victuals, corn or grain; or if any person shall ring a bell, beat a drum, or sound a trumpet, and thereby raise above the number of twelve for the purposes aforesaid, which are raised accordingly and do the fact, and dissolve not within an hour after proclamation, or that shall convey money, harness, artillery, it is enacted to be felony; and if any above the number of two, and under twelve, do practise with the force of arms unlawfully, and of their own authority to kill any of the [135] queen's subjects, to dig up pales, throw down inclosures of parks, pull down any house, mill, or burn any stack of corn, or abate rents of manors, lands or tenements, or price of corn or victual, and do not depart within an hour after proclamation, and continue to attempt to do or put in ure any of the things above-mentioned, they are to have a year's imprisonment.

And the statute of 3 & 4 E 6. cap. 5. is to the same purpose, only if the number of forty, or above, come together to do such acts as before, or any other felonious, rebellious, or traiterous acts, and continue together two hours, it is made high treason (*h*).

But yet the greater opinion obtained, as it was fit; and these apprentices had judgment, and some of them were executed, as for high treason.

Yet this use may be made of those statutes: 1. That there may be several riots of a great and notorious nature, which yet amount not to high treason. 2. But again, those acts and attempts possibly might not be general, but might be directed only to some particular instances, as for the purpose, not to pull down all houses or mills, but some special ones, which they thought offensive to them; nor to abate the rents of all manors, but of some particular manor, whereof they were tenants; nor to make a general abatement of the prices of victuals or corn, but in some particluar market; or within some precinct; and so crosseth not the general learning before given of constructive treason. 3. It seems by that act also, they did not take the bare assembly to

(b) See also 1 Geo. I. cap. 5.

that

that intent to be a sufficient overt-act of levying of war ; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practising or putting in ure ; for this act puts a difference between the same and the doing thereof.

In the parliament of 20 E. I. now printed in Mr. Ryley, p. 77. it appears there arose a private quarrel between the earls of Gloucester and Hereford, two great lords marchers ; and hereupon divers of the earl of Gloucester's party with his consent *cum multitudine tam equitum quam pedum exierunt de terra ipsius comitis de Merton cum vexillo de armis ipsius comitis explicato versus terram comitis Hereford de Brecknock, & ingressi fuerunt terram illam per spatium duarum leucarum, & illam deprædati fuerunt, & bona illa deprædata usque in terram dicti comitis Glocestriæ adduxerunt, and killed many, and burnt houses and committed divers outrages ; and the like was done by the earl of Hereford and his party upon the earl of Gloucester : they endeavoured to excuse themselves by certain customs between the lords marchers ; by the judgment of the lords in parliament their royal franchise, were seised as forfeited during their lives, and they committed to prison, till ransomed at the king's pleasure.*

Altho' here was really a war levied between these two earls, yet inasmuch as it was upon a private quarrel between them, it was only a great riot and contempt, and no levying of war against the king ; and so neither at common law, nor within the statute of 25 E. 3. if it had been then made, was it high treason.

It appears by *Walsingham sub anno 1403.* a great rebellion was raised against Henry IV. by Henry Percy son of the earl of Northumberland and others : the earl gathered a great force, and actually took part with neither, but marched with his force, as some thought, towards his son, and, as others thought, towards the king *pro redintegrando pacis negotio* ; he was hindered in his march by the earl of Westmoreland and returned to his house at Werkworth ; the king had the victory ; the earl petitioned the king ; the whole fact was examined in parliament, *Rot. Parl. 5 H. 4. n. 12.* The king demanded the opinion of the judges and his counsel touching it : the lords protest the judgment belongs in this case to them ; the lords by the king's command take the business into examination, and upon view of the statute of 25 E. 3. and the statute of Liveries " *Adjugerent, qe ceo, qe fuit fait par le counte, neft pas treason, ne felony, mes trespass tantfolement, pur quel trespass le dit counte deuf faire fine & ransom a volonte du rey;*" but Henry the son was attaint of treason.

It appears not what the reason of that judgment was, whether they thought it only a compassing to levy war, and no war actually levied by him, because not actually joined with his son; or whether they thought his intention was only to come to the king to mediate peace, and not to levy a war, nor to do him any bodily harm; that it was indeed an offense in him to raise an army without the king's commission, but not an offense of high treason, because it did not appear that he raised arms to oppose the king, but possibly to assist him; but whatever was the reason of it, it was a very mild and gentle judgment, for the earl was doubtful of a more severe judgment: *nota*, he returns thanks to the lords and commons *de lour bone & entyre coers a lui monstre*, and thanks the king for his grace.

The clause in the statute of 25 E. 3. *If any man ride armed covertly or secretly with men of arms against any other to slay, rob, or take him, or to detain him, till he hath made fine or ransom, or have his deliverance, it is not in the mind of the king or his council, that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old times used, and according as the case requireth; and if in such case or other like (i) before this time any judges have judged treason, and for this cause the lands and tenements have come to the king's hands as forfeited, the chief lords of the fee shall have the escheat.*

This declares the law, that a riding armed with men of arms upon a private quarrel or design against a common person is not a levying of war against the king (*k*); and the especial reason of the express adding of this clause seems to be in respect of that judgment [138] of treason given against Sir John Gerberge, *Trin. 21. E. 3. Rot. 23. Rex.* and at large before mentioned, *chap. 11.* which judgment is in effect repealed by this act.

It appears by Sir F. Moore's *Rep. n. 849.* (*l*) the earl of Essex was arraigned and condemned for high treason before the lord high steward, whereupon it was resolved by the justices, 1. That when the queen sent the lord keeper of the great seal (*m*) to him, commanding

(i) *Vide similis H. 26. E. 3. curia regis, Rot. 30. Rex. Hale.*

This case was in the county of Essex, and was no more than this; Sir John Fitzwater and William Beltrip his steward, &c. were presented by juries of divers hundreds for taking men by force, and detaining them till they paid fines for their ransom, for exacting and extorting money from others, and for several great and enormous riots, misdemeanours and trespasses in the county of Essex, *arrelando fit rega-*
les postulatis, upon which Sir John Fitzwater surrendered himself, and was committed to the Tower of London, and Beltrip was outlawed, who afterwards pleaded the king's pardon pro felonii, conspiracione, sumutorum & transgreditionibus predictis, necnon pro scelariis occasione præmissorum in ipsius præmigratio, upon which he was discharged sine die.

(k) *C. P. C. p. 20.*

(l) *p. 69.*

(m) And others of her council.

him.

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him to dismiss the armed persons in his house and to come to her, and he refused to come, and continued the arms and armed persons in his house, that was treason. 2. That when he went with a troop of captains and others from his house in the city of *London*, and there prayed aid of the citizens in defense of his life, and to go with him to the queen's court to bring him into the queen's presence with a strong hand, so that he might be powerful enough to remove certain of his enemies, that were attendant on the queen, this was high treason, because it tends to a force to be done upon the queen, and a restraint of her in her house; and the fact in *London* was actual rebellion, tho he intended no hurt to the person of the queen. 3. That the adherence of the earl of *Southampton* to the earl of *Essex* in *London*, tho he did not know of any other purpose than of a private quarrel, which the earl of *Essex* had against certain servants of the queen, was treason in him, because it was a rebellion in the earl of *Essex*. 4. That all they, that went with the earl of *Essex* from *Essex*-house to *London*, whether they knew of his intent or not, were traitors, whether they departed upon the proclamation or not; but those, that suddenly adhered to him in *London*, and departed upon the proclamation made, were within the proclamation to be pardoned: there were other points resolved touching the manner of his trial, whereof hereafter.

The whole history of *Essex* his treason and the proceeding thereupon is set forth at large by *Camden anno 44 Eliz. p. 604. & sequentibus*, wherein the charge of his indictment appears to be, that he and his accomplices had conspired to deprive the queen of her [139] crown and life, having consulted to surprize the queen in the court; and that they had broken out into open rebellion by imprisoning the counsellors of the realm, by stirring up the *Londoners* to rebellion by tales and fictions, by assaulting the queen's faithful subjects in the city, and defending the house against the queen's forces; so that the great part of the indictment was compassing the queen's death, and the rest of the charge were the overt-acts, which was treason within the statute of 25 E. 3. with which my lord *Coke* agrees, *P. C. p. 12.*

If divers persons levy war against the king, and others bring them relief of victuals *pro timore mortis*, *& recesserunt quam citè potuerunt*, this was adjudged not to be a levying of war, because *pro timore mortis*; *quare*, if the same law be in case of marching with them in their company for fear of death. *Co. P. C. p. 10. vide sup. cap. 8. Mich. 21 E. 3. Rot. 101. Linc. coram rege. Illi, qui coacti fuerunt ad denarios reci-*

*piendos & similièr coacti juraverant, dimittuntur per curiam per manu-
captionem, quia scilicet in personis ipsorum nihil mali reperitur, in case of a
great riot, not unlike a levying of war, for which they were indicted
of treason.*

Rot. Par. 17 R. 2. n. 20. upon the complaint of the dukes of Aquitaine and Gloucester, shewing that Thomas Talbot and others his adherents by confederacy between them faulement conspirerent pur tuer les dits ducs uncles le roy & autres personnes grants de realme, & pur accomplier le malice susdit le dit Thomas & les autres mistrent tout lour poyar, come notoirement est conus, & le dit Thomas ad en grand party confessé, en anientismen des estats & de loys de vostre realme, & sur ceo firent divers gents lever armes, & arrayes a feire de guerre en assemblies & congregations a tres grant & horrible number en divers parties en les countie de Cestre, and pray that it may be declared in this parliament the nature, pain and judgment of this offense : the conclusion whereof was thus :

" *Est avys au roy & a les seigniors de cest parlement en droit de mesme
" la bille touchant Thomas Talbot, que la matter contenus en la dite bill
" est overt & haut treason, & touche la person du roy & tout son realme,
[140] " & pur treason le roy & tous les seigneurs susdits adjug-
gent & declarant;*" and thereupon writs of proclamation for his appearance in the king's bench are ordered to issue for his appearance in one month, or otherwise to be attaint of treason (*n*) : *vide Rot. 17. R. 2 B. R. Rot. 16. Rex.* Writs of proclamation issued accordingly to the sheriffs of Yorkshire and Derbyshire, and the sheriffs returned *non est inventus*; Talbot afterwards came and rendered himself, and was committed to the Tower, and afterwards a *Superfedeas* came for his enlargement (*o*).

But this declaration being only by the king and house of lords is not a conclusive or a sufficient declaration of treason according to the purview of this statute, but yet it was a real levying of war against the king, because done *more guerrino* and by people arrayed *de fet de guerre*, as in Bensted's case hereafter mentioned ; but had it been a bare conspiracy, it had not been treason, as appears by the special statute of 3 H. 7. cap. 14. whereby a conspiracy to kill the king without an

(*n*) And all persons, that shall receive the said Sir Thomas Talbot within the realm of England, after the said month elapsed from the time of the said proclamation, are declared guilty of high treason upon conviction of such harbouring or receiving.

(*o*) The *Superfedeas* was not expressly for his enlargement, *Sed quod enicunq; pro-cessu versus ipsum Thomas Talbot ex causa predictis alterius faciendo superfedeans, quo-unque alio a rege inde habuerint in manda-*

overt-act, (for then it were treason within the statute of 25 E. 3.) or a conspiracy to kill any of his privy council and certain great officers, tho the event followed not, is made felony.

See for instances of very great riots with multitudes of persons *mores guerrino arraiati*, which yet amounted not to high treason, because upon particular quarrels and differences between private persons. *Claus. 5 E. 2. M. 4. inter Griffinum de Pole & Johannem de Cheroneton pro castro de Pole.* *Pat. 8 E. 4. part 1. n. 7. dorf.* between the citizens and bishop of Norwich (p). *Rot. Parl. 5 R. 2. n. 45.* between the town and university of Cambridge. *Rot. Parl. 11 H. 4. n. 37. & sequentibus,* between Hugh de Erdefwick and others touching the castle of Bothall. *Rot. Parl. 13 H. 4. n. 12.* between the lord *Ross* Sir Robert Tyrhylt touching Turbary in Wroughtly. *Rot. Parl. 4 H. 5. n. 15.* between Robert Whittington and Philip Lingdon and others. *H. 26 E. 3. Rot. 30. Rex Fitzwalter's case* [141] (q).

All which, tho they were enormous riots, and done *more guerrino*, yet being private and particular quarrels, not much unlike that between the earls of Gloucester and Hereford, did not amount to high treason, but contempts, riots; or, if death ensued, felony, as the case required.

But going in a warlike manner with drums and arms to surprize the archbishop of Canterbury, who was a privy counsellor, it being with drums and a multitude (as the indictment was) to the number of three hundred persons, was ruled treason by all the judges of England, and the offenders had judgment accordingly; and at the same time by ten of the judges it was agreed, that the breaking of prison, where traitors were in durance, and causing them to escape was treason, altho the parties did not know that there were any traitors there, upon the case of 1 H. 6. 5. b. and so to break a prison where felons are, whereby they escape, is felony without knowing them to be imprisoned for such offense. *P. 16 Car. Crok. Thomas Bonfild's case* (r).

The case of Sir John Oldcavile for levying of war against the king is entered *Rot. Parl. 5 H. 5. n. 11.*

(p) This is not to be found among the records.

(q) *Nicholas Brundifb* and others to the number of one hundred were sent by Sir John Fitzwalter armed *platis, gladiis, bardingis, arcubus & sagittis ad modum guerra* to seize and take *bones, apes, &c.* of Thomas Hubert in Herleavor upon the lands of the said Thomas, quas tenuit de aliis dominis & sibi de ipso Johanne Fitzwalter;

accordingly they did so, and carried them away to manors belonging to the said Sir John; but neither this riot, nor any other facts, which he or his accomplices were indicted for, were conceived to amount to treason, since none of them were arraigned of more than felony; *wide supra in notis, p. 137.*

(r) *Car. 583. W. Jones 455.*

The

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The twenty-fifth of September anno domini 1413, Thomas archbishop of Canterbury the pope's legate by his sentence definitive declared Sir John Oldcastle lord Cobham an heretic, especially in the point of the sacrament of the eucharist and penance, excommunicated him, *relinquentes ipsum ex nunc tanquam haematicum iudicio seculari* (f).

Hill. 1 H. 5. Rot. 7. inter placita regis, Middlesex, there is an indictment against him before certain commissioners of eyre and [142] terminer of London and Middlesex, returned into the king's bench to this effect (t):

" Quod *Johannes Oldcastell de Conyng* in com' *Kenc'* chivaler, &
" alii lollardi vulgariter nuncupati, qui contra fidem catholicam di-
" versas opiniones haereticas & alios errores manifestos legi catholicæ
" repugnantes, a diu est, temerariè tenuerunt opiniones & errores
" predicatorum manuteneare, aut in facto minimè perimplere valentes,
" quam diu regia potestas & tam status regalis domini nostri regie,
" quam status & officium prælatæ dignitatis, infra regnum *Angliae*
" in prosperitate perseverarent; falso & proditoriè machinando tam
" statum regium quam statum & officium prælatorum, nec non or-
" dinis religiosoram infra dictum regnum *Angliae* penitus aduallare
" ac dominium nostrum regem, fratres fricos, prælatos & alios magna-
" tes, ejusdem regni interficere, nec non viros religiosos, relictis cul-
" tibus divinis & religiosis observantiis, ad occupationes mundanas
" provocare; & tam ecclesiæ cathedrales, quam alias ecclesiæ & do-
" mos religiosas de reliquia & aliis bonis ecclesiasticis totaliter spo-
" liare ac funditus ad terram prostertere, & dictum *Johannem Old-*
" *castell* regentem ejusdem regni constitutere, & quæplura regimine
" secundum eorum voluntatem infra regnum predictum, quasi gens
" sine capite, in finalē destructionem tam fidei catholicæ & cleri,
" quam statutis & majestatis dignitatis regalis, infra idem regnum or-
" dinare, falso & proditoriè ordinaverunt & proposuerunt, quod ipse
" insimul cura quæpluribus rebellibus domini regis ignotis ad au-
" merum viginti milliū hominū de diversis partibus regni *Angliae*
" modo guerrino arratiatis privatim insurgerent, & dic Mercuriū prox.
" mo post festum *Epiphaniae* domini anno regni regis nunc primo
" apud *Villam* & parochiam sancti *Egidii* extra barram veteris *Templi*

(f) See State Tr. Vol. I. p. 42.

(t) See State Tr. Vol. VI. Appendix A.
4. For in his acts and monuments, Vol. I. p. 655. brings several arguments to prove this indictment to be a forged one; but

whatever the indictment was, there is reason sufficient to believe the pretended con-
spiracy was so. See Roper's history sub
anno 1414.

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" London in quodam magno campo ibidem unanimiter convenient
 " & insimul obviarent pro nefando proposito suo in præmissis per-
 " implendo, quo quidem die Mercurii apud *Villam* & pa- [143]
 " rochiam prædictas prædicti *Johannes Oldcastell* & aliœ in
 " huiusmodi proposito proditorio perseverantes prædictum dominum
 " nostrum regem, fratres suos, viz. *Thomam ducem Clarendon*, *Jo-*
 " *hannem de Lancastre*, & *Hunfridum de Lancastre*, nec non præ-
 " lasos & magnates prædictos interficere, nec non ipsum dominum
 " nostrum regem & heredes suos de regno suo prædictio exhaeredare,
 " & præmissa omnia & singula, nec non quamplura alia mala & in-
 " tolerabilia facere & perimplere, falso & proditorie proposuerunt &
 " imaginauerunt, & ibidem versus campum prædictum modo guerrino
 " arratiati proditorie modo insurrectionis contra ligantias suas equi-
 " taverunt ad debellandum dictum dominum nostrum regem, nisi
 " per ipsum manu forti gratiose impediti fuissent, quod quidem in-
 " dictamentum dominus rex nunc certis de causis coram eo venire
 " fecit terminandum——Per quod præceptum fuit vic' quod nona
 " omittaret, &c. quin caperet præfatum *Johannem Oldcastell*, si, &c.
 " & salvo, &c." upon this indictment removed into the king's bench
 he was outlawed.

All this record ad process at the request of the commons was re-
 moved into parliament, and in the presence of the *custos regni*, lords,
 and commons was read, and expounded in *English* to Sir *John Old-*
castle, and it was demanded what he could say why execution should
 not be done upon him upon that utlary ; and he saying nothing in his
 excuse " pur que agard est en mesme le parlement per les seigneurs ayant
 " ditz, & l'affent de le dit gardien, & a la pryer suisdit, qe. le dit
 " Jolan, come traytour a dieu & heretique notoirement approuve &
 " ad-
 " jugge, come peirt per un instrument l'archevequesque confue ala dors de
 " cest roll, & come traytour a roy & a son roialme, soit amesne a la
 " Tower de Londres, & d'illoques soit traens per my le city de Lon-
 " dres, tanque as quel surches en le paroche de St. Giles hors de la
 " barre de vist Temple de Londres, & illoques soit pendus, & ars
 " pendant (u).

How this nobleman was pursued by the ecclesiastics, and [144]
 the whole story is set down by *Walsingham*.

(u.) The author of the trial of Sir *John Oldcastile* says, that this sentence was in pur-
 pointed that punishment in those cases.
 See *Sates Tr.* Vol. I. p. 49.

That

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That which I observe in it is, 1. That the indictment is principally founded upon that article of this statute of compassing the king's death, and yet the overt-act is an assembly to levy war, and actual levying of war. 2. Altho this indictment is not expressly upon this clause of levying of war, for that is not the principal charge of the indictment, but compassing the king's death, yet the marching with a great army to St. Giles's *modo guerrino arraiati* was an express levying of war, tho there were no blow yet struck. But 3. it seems their first meeting to contrive their coming to St. Giles's, tho it might be an overt-act to compass the king's death, and so treason within the first clause of the statute, yet was not an actual levying of war, and so not treason within that clause of the statute; but their actual marching in a body *modo guerrino & modo insurrectionis* might be a levying of war within the statute. 4. That actual levying of war, tho it be a treason, upon which *Oldcastle* might have been indicted; yet it was also an overt-act to serve an indictment for compassing the king's death, as hath been shewed at large before.

If there be an actual rebellion or insurrection, it is a levying of war within this act; and by the name of levying of war it must be expressed in the indictment. *Co. P. C. p. 10.*

And in *Anderson's Rep. part 2 n. 2.* after *Trinity-term 37 Eliz.*
 (x) before the two chief justices, master of the rolls, baron *Clerk* and *Ewens*, the case was, that divers apprentices of *London* and *Southwark* were committed to prison for riots, and for making proclamation concerning the prices of victuals, some whereof where sentenced in the star-chamber to be set in the pillory and whipt; after which divers other apprentices and one *Grant of Uxbridge* conspire to take and deliver those apprentices out of ward, to kill the mayor of *London*, and to burn his house, and to break open two houses near the *Tower*, where there were divers weapons and arms for three hundred men, and there to furnish themselves with weapons; after which divers [145] apprentices devised libels, moving others to take part with them in their devices, and to assemble themselves at *Bun-hill* and *Tower-hill*; and accordingly divers assembled themselves at *Bun-hill*, and three hundred at the *Tower*, where they had a trumpet, and one that held a cloak upon a pole in lieu of a flag, and in going towards the lord mayor's house the sheriffs and sword-bearer with others offered to resist them, against whom the apprentices offered violence.

(x) 2 And. 4.

And

And it was agreed by the judges referees, that this was treason within the statute of 13 Eliz. for intending to levy war against the queen; for they held, that if any do intend to levy war for any thing, that the queen by her laws or justice ought or may do in government as queen, that shall be intended a levying of war against the queen; and it is not material, that they intended no ill to the person of the queen, but if intended against the office and authority of the queen, to levy war, this is within the words and intent of the statute, and hereupon *Grant* and divers others were indicted and executed.

And *codem libro n. 49. (y)* the case of *Burton* mentioned by my lord *Coke*, *P. C. p. 10.* is reported, *viz.* in the county of *Oxford* divers persons conspire to assemble themselves, and move others to rise and pull down inclosures, and to effect it they determined to go to the lord *Norris's* house and others, to take their arms, horses, and other things, and to kill divers gentlemen, and thence to go to *London*, where they said many would take their parts; and this appeared by their confessions: and it was agreed, 1. That this was treason within the statute of 13 Eliz. for conspiring to levy war against the queen. 2. But not within the statute of 25 E. 3. because no war was levied, and that statute extended not to a conspiracy to levy war.

Nota; in both these cases there was a conspiring to arm themselves as well as to assemble, which had they effected and so assembled *more guerino*, it had been a war levied, and by construction and interpretation a war levied against the queen.

If any with weapon invasive or defensive doth hold and [146] defend a castle or fort against the king and his power, this is a levying of war against the king within this act. *Co. P. C. p. 10.* *Videlicet* the statute of 13 Eliz. cap. 1. & *dicitur ibid. postea.*

There is a great difference between an insurrection upon the account of a civil interest and a levying of war.

A. recovers possession against *B.* of a house, &c. in a real action, or in an *ejectione firmæ*, and a writ of seisin or possession goes to the sheriff, *B.* holds his house against the sheriff with force, and assembles persons with weapons for that purpose, who keep the house with a strong hand against the sheriff, tho assisted with the *posse comitatus*: this is no treason either in *B.* or his accomplices, but only a great riot and misdemeanor; the like is to be said touching a man that keeps possession against a restitution upon an indictment of forcible entry.

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But if *B.* either fortifies his own house or the house of another with weapons defensive or invasive purposely to make head against the king and to secure himself against the king's regal army or forces, then that is a levying of war against the king.

But the bare detaining of the king's castles or ships seems no levying of war within this statute: *vide infra* 13 Eliz. cap. 1. & *dicitur ibidem*.

If the king's lieutenant in a time of hostility or rebellion within the realm be assaulted upon their march or in their quarters as enemies, this is a levying of war; but if upon some sudden falling out or injury done by the soldiers, the countrymen rise upon them and drive them out, this may be a great riot, and if any be killed by the assailants it is felony in them; but this seems not a levying of war against the king, unless there be some traitorous design under the cover of it: and claus. 26 E. 3. m. 24. it appears, that an open resistance of the justices of *oyer and terminer* in the county of *Surrey*, viz. *refusando justiciariis, & ipso justiciario, quo minus contenta in commissione nostræ ois inde facta exequi & facere potuerunt, impediendo*, was felony, and the offenders were executed for the same as felons.

[*143] I shall conclude this matter with a consultation of the judges, where I was at present. All the judges except *J. Windham* and *J. Atkins* were assembled by my lord keeper, September 1675. to consider of this case, as it was stated in writing by the attorney general in manner following:

" A great number of weavers in and about *London* being offended
" at the engine-loom, (which are instruments, that have been used
" above these sixty years,) because thereby one man can do as much
" in a day, as near twenty men without them, and by consequence
" can afford his ribbands at a much cheaper rate, after attempts in
" parliament and elsewhere to suppress them did agree among them-
" selves to rise and go from house to house to take and destroy the
" engine-looms; in pursuance of which they did on the 9th, 10th,
" and 11th of this instant *August* assemble themselves in great num-
" bers at some places to an hundred, at others to four hundred, and
" at others, particularly at *Stratford-Bow* to about fifteen hundred.

" They did in a most violent manner break open the houses of
" many of the king's subjects, in which such engine-looms were, or
" were by them suspected to be, they took away the engines, and
" making great fires burnt the same, and not only the looms, but in
" many

" many places the ribbands made thereby, and several other goods of
" the persons whose houses they broke open; this they did not in
" one place only, but in several places and counties, *viz.* *Middlesex*,
" *London*, *Essex*, *Kent*, and *Surrey*, in the last of which, *viz.* at *South-*
" *werk* they stormed the house of one *Thomas Byby*, and tho they
" were resisted and one of them killed and another wounded, yet at
" last they forced their way in, took away his looms and burnt them;
" the value of the damage they did, is computed to several thousand
" pounds.

" This they did after several proclamations made and command
" given by the justices of peace and the sheriffs of *Middlesex* to de-
" part, but instead of obeying they resisted and affronted [• 144]
" the magistrates and officers: It is true they had no war-
" like arms, but that was supplied by their number, and they had
" such weapons, as such a rabble could get, as staves, clubs, sledges,
" hammers, and other such instruments to force open doors.

" There was this further evil attending this insurrection, that the
" soldiers and officers of the militia were so far from doing their duty
" in suppressing them, that some, tho in arms and drawn up in com-
" panies, stood still looking on while their neighbours houses were
" broken open and their goods destroyed, others encouraged them, and
" others, to whose custody some of the offenders, who were taken,
" were committed, suffered them to escape, so that during all the
" time of the tumult little or nothing was done to suppress them, un-
" til the lords of the council were constrained at a time extraordinary
" to assemble, by whose directions and orders as well to the civil ma-
" gistrates, as to the king's guards, they were at last quieted."

Five of the judges seemed to be of opinion that this was treason
within the act of 25 E. 3. upon the clause of levying war against
the king, or at least upon the clause of the statute of 13 Car. 2.
cap. 1.

1. In respect of the manner of their assembling, who, tho they had
no weapons or ensigns of war, yet their multitudes supplied that de-
ficit, being able to do that by their multitudes, which a lesser number
of armed men might scarce be able to effect by their weapons; and
besides, they had staves, and clubs, and some hammers or sledges to
break open houses, and accordingly they acted by breaking open
doors

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doors and burning the engine-looms and many of the wares made by them.

2. In respect of the design itself, which was to burn and destroy not the single engine-looms of this or that particular person, but engine-looms in general, and that not in one county only, but [*145] in several counties, and so agreeable to *Burton's case*.

The other five judges were not satisfied, that this was treason within the clause of 25 E. 3. against levying of war, nor within the statute of 13 Car. 2. for conspiring to levy war.

1. It was agreed, that if men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed, tho' this were not a treason within this clause of the statute of 25 E. 3. yet it was treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such an indictment, tho' no war was actually levied; and with this accord the resolutions before cited, especially that of the insurrection in the north at *Farley wood* (*); but no such conspiracy or compassing appears in this case, and so that is not now in question, but we are only upon a point of constructive or interpretative levying of war.

2. Here is nothing in this case of any conspiring to do any thing, but what they really and fully effected; they agreed to rise in multitudes to burn the looms, and accordingly they did it, but nothing of conspiring against the safety of the king's person, or to arm themselves; therefore if what they did were not a levying of war against the king within the statute of 25 E. 3. here appears no conspiring to levy such war within the statute of 13 Car. 2. cap. 1. for, what appears, all was done, which they conspired to do.

3. It seemed very doubtful to them, whether in the manner of this assembling it was any levying of war, or whether it were more than a riot, for in all indictments of this kind for levying of war it is laid, [*146] that they were *more guerrino arraiati*, and upon the evidence, that they were assembled in a posture of war *armis offensivis*

(*) *Vide supra* p. 120.

E de-

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& defensivis, and sometimes particular circumstances also proved or found, as banners, trumpets, drums, &c. and where they were indicted for conspiring only to levy war, yet there was this circumstance accompanied it, viz. a confederacy to get arms and arm themselves, as in *Gren's case*, and *Burton's case*.

4. It seemed very doubtful to them, whether this design to burn engine-looms were such a design, as would make it a levying of war against the king (*), for it was not like the designs of altering religion, laws, pulling down inclosures generally, as in *Burton's case*, nor to destroy any trade, but only a particular quarrel and grievance between men of the same trade against a particular engine, that they thought a grievance to them, which, tho' it was an enormous riot, yet it would be difficult to make it treason. *Vide Statutes 8 H. 6. cap. 27. 9 H. 6. cap. 5. (†)*.

Many of them therefore concluded, that if Mr. Attorney should think fit to proceed as for a treason, the matter might be specially found and so left to farther advice, or rather that according to the clause of the statute of 25 E. 3. the declarative judgment of the king and both houses of parliament might be had, because it was a new case and materially differed from other cases of like nature formerly resolved.

Upon the conclusion of this debate we all departed, and Mr. Attorney upon consideration of the whole matter, it seems, thought fit to proceed for a riot, and caused many of them to be indicted for riots, for which they were convicted and had great fines set upon them, and were committed in execution and adjudged to stand upon the pillory.

Touching the laws of treason in *Ireland*, by the statute of [147] 18 H. 6. cap. 3. levying horse or foot upon the king's subjects against their will shall be treason; this they call cesting of soldiers upon men, and hath been often done by the lieutenants or deputies of *Ireland* by consent of the council in some cases.

Among many cumulative treasons charged upon the late earl of *Strafford* the king's deputy in *Ireland*, this one thing of cesting of

(*) By 12 Geo. 1. cap. 34. " If any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner, or shall break or enter by force into any house or shop by night or by day for such purpose, he

" shall be adjudged guilty of felony with out benefit of clergy.

(†) Concerning the riots committed by the *Welsh* upon the dragoons of *Swansea*, *vide infra*, p. 151.

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soldiers upon the king's subjects in *Ireland* was the chief particular treason charged upon him.

It was insisted upon for the earl's defence, that by the statute of 10 H. 7. in *Ireland*, cap. 22. called *Poyning's law*, all the statutes of *England* are at once enacted to be observed in *Ireland*; and therefore the statute of 25 E. 3. declaring treasons, and the statute of 1 H. 4. cap. 10. enacting, that nothing shall be treason but what was within that statute, the treasons enacted in *Ireland* in the time of H. 6. and afterwards before 10 H. 7. were repealed, and consequently this statute of 18 H. 6. cap. 3.

But that seems not to be so, for the general introduction of the statutes of *England* being an affirmative law could not be intended to take away those particular statutes, that were made in *Ireland* for the declaring of treason, as this and that also of the same year, cap. 2. for taking *Comericke* (z).

But surely this was no levying of war within this statute (a), either in respect of the matter itself or of the person that did it, he being the king's lieutenant, neither could an act by the lord deputy and council of this nature be construed to be within the penalty of this act, if it were in force; yet for this and other cumulative treasons he was attainted by act of parliament, but that attainder was very justly repealed by the statute of 14 Car. 2.

[148] Now I shall draw out some observations and conclusions from the precedents and instances before given touching this obscure clause of levying war against the king.

1. A conspiracy or confederacy to levy war against the king is not a levying of war within this clause of the statute of 25 E. 3. for this clause requires a war actually levied. *Co. P. C. p. 10.*

And this appears first by those temporary laws, that were made to continue during the king's or queen's life, which made conspiring to levy war with an overt-act evidencing such conspiracy to be treason, as the statutes of 1 & 2 Ph. & M. cap. 10. 13 Eliz. cap. 1. and 13 Car. 2. cap. 1. and secondly by the resolution of the judges in the case of *Burton* 39 Eliz. cited by my lord *Coke*, *P. C. p. 9, 10.*

2. That yet such a conspiracy or compassing to levy war against the king directly or against his forces, and meeting and consulting for

(z) That is, for taking thieves, robbers, or rebels into safe guard.

(a) Tho' this were not levying of war, yet being cessing of soldiers upon the subjects, it was treason within the express words of that statute; nor does our author assign any reason, why an act of lord deputy and council is not within the penalty of that law. See *Card. Eliz. p. 219.*

the

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the effecting of it, whether the number of the conspirators be more or less, or disguised under any other pretence whatsoever, as of reformation of abuses, casting down inclosures particular or generally, day of wrestling, football-playing, cock-fighting; yet if it can appear, that they consulted or resolved to raise a power immediately against the king, or the liberty or safety of his person, this congregating of people for this intent, tho no war be actually levied, is an overt-act to maintain an indictment, for compassing the king's death within the first clause of the statute of 25 E. 3. for it is a kind of natural or necessary consequence, that he, that attempts to subdue and conquer the king, cannot intend less than the taking away his life; and indeed it hath been always the miserable consequence of such a conquest, as is witnessed by the miserable tragedies of E. 2. and R. 2. and this was the case of *Oldcastle* and *Effex.*

3. That yet conspiring to levy war, (*viz.* to do such an act, which if it were accomplished and attained its end would be an actual levying of war) and being accompanied with an overt-act evidencing it, (tho it be not treason within this clause of the act of 25 E. 3.) yet was treason during the queen's life by the statute of 13 Eliz. [149]
cap. 1. and is treason at this day by the statute of 13 Car. 2.
cap. 1. during the life of our now sovereign.

But then the overt-act (be it speaking, writing, or acting) required by these statutes to evidence the same must be specially laid in the indictment, and proved upon the evidence; thus in *Grant's case* and *Burton's case* the conspiring to fetch arms at the houses therein mentioned was an overt-act proving this conspiracy to levy war.

4. That a levying of war with all the circumstances imaginable to give it that denomination, as *cum vexillis explicatis, cum multitudine gentium armatorum & modo guerrino arraiat*, yet if it be upon a mere private quarrel between private, tho great persons, or to throw down the inclosures of such a manor or park, where the party tho without title claims a common, or upon dispute concerning the propriety of liberties or franchises, this, tho it be in the manner of it a levying of war, yet it is not a levying of war against the king, tho bloodshed or burning of houses ensue in that attempt, but is a great riot, for which the offenders ought to be fined and imprisoned; and if any be killed by the rioters in the riot, it may be murder in the assailant.

This was the case of the earls of *Gloucester* and *Hereford*, anno 20 E. 1. tho before the statute of 25 E. 3. and the several great riots

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above-mentioned, to which we may add *Rot. Parl.* 50 E. 3. n. 140, 164. 11 H. 4. n. 36, 57. 13 H. 4. n. 14. 18 H. 6. n. 30.

5. An actual levying of war therefore against the king to make a treason, for which the offender may be indicted upon this clause of the statute for levying of war against the king, consists of two principal parts or ingredients, *viz.* 1. It must be a levying of war. 2. It must be a levying of war against the king.

6. What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, tho' *de facto* they commit the act they intend, that [150] makes a levying of war, for then every riot would be treason, and all the acts against riotous and unlawful assemblies, as 13 H. 4. cap. 7. 2 H. 5. cap. 8. 8 H. 6. cap. 14. and many more (b) had been vain and needless; but it must be such an assembly as carries with it *speciem belli*, as if they ride or march *vexillis explicatis*, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war, which circumstances are so various, that it is hard to define them all particularly.

Only the general expressions in all the indictments of this nature, that I have seen, are *more guerrino arraiati*, and sometimes other particulars added as the fact will bear, as *cum vexillis explicatis*, *cum armis defensivis & offensivis*, *cum tympanis & tubis*: but altho' it be a question of fact, whether war be levied or conspired to be levied, which depends upon evidence, yet some overt-act must be shewn in the indictment, upon which the court may judge; and this is usually *modo guerrino arraiati*, or *armati*, or conspiring to get arms to arm themselves.

And therefore in the cases of *Burton* and *Grant* before-mentioned, who were indicted and convicted upon the statute of 13 Eliz. cap. 1. for conspiring to levy war for pulling down inclosures, &c. there is not only the conspiracy to do the thing, but also to gain arms and weapons at the lord *Norris's* house, and elsewhere to arm themselves for that attempt.

And the reason hereof seems to be, because, when an assembly of people thus arm themselves, it is a plain evidence, that they mean to defend themselves, and make good their attempts by a military force, and to resist and subdue all power, that shall be used to suppress them;

(b) See 3 & 4 Edw. VI. cap. 5. 1 Mar. cap. 12. 1 Geo. I. cap. 5.

and

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and besides, the very use of weapons by such an assembly without the king's licence, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force, and therefore under a distinct and special restraint by the statute of *Westmyns^t 2.* [151] (*c*) and the statute (*d*) of 7 E. 1. *de defensione portandi arma.*

7. Whether the bare assembling of an enormous multitude for doing of these unlawful acts without any weapons, or being *more guerris arrati*, especially in case of interpretative or constructive levying of war, be a sufficient overt-act to make a levying of war within this act, especially if they commit some of these acts themselves, is very considerable and seems to be doubtful. 1. Because I have not known any such case ruled. 2. Because the acts of 3 & 4 Ed. 6. cap. 5. and 1 Mar. cap. 12. (which must be intended of such unarmed assemblies) makes it in some cases felony, in some cases only misdemeanor. 3. Because it is very difficult to determine what that number must be, that must make treason, and less than which must be only a riot; this therefore should be well considered, and the direction of the statute of 25 E. 3. to expect the declaration of parliament in like cases is a safe direction, and so much the rather, because the statutes of E. 6. and queen *Mary* seem to look the other way (*e*), to which may be added the great riots committed by the foresters and *Welsh* upon the dragmen of *Severn*, hewing all their boats to pieces, and drowning the barge-men in a warlike posture. *Rol. Parl.* 8 H. 6. n. 30, 45. 9 H. 6. n. 37. upon which the statute of 9 H. 6. cap. 5. was made: I forbear therefore any opinion herein.

8. But whether the assembly were greater or less, or armed or not armed, yet if the design were directly against the king, as to do him bodily harm, to imprison, to restrain him, or to offer any force or violence to him, it will be treason within the first clause of compassing the king's death, and this assembling and consulting or practising together to this purpose, tho' of but two or three, will be an overt-act to prove it; therefore all the question will be only touching interpretative or constructive levying of war, whereof here- [152] after.

(c) I don't find any thing to this purpose in the statute of *Westmyns^t 2.* so suppose the statute here meant is the statute of *Northum^r 2 E. 3. cap. 3.* whereby it is prohibited that any one bring force in array of the people, or go armed by night or by

day. See *C. P. C.* p. 158 & 160. *F.N.B.* p. 552.

(d) Or rather proclamation: see the beginning of this chapter.

(e) As does also 1 *Gra. I. cap. 5.*

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9. If there be war levied as is above declared, *viz.* an assembly *more guerrino arraiati*, and so in the posture of war for any treasonable attempt; this is *bellum levatum*, tho' not *bellum percussum*: and thus far touching the levying of war, as in relation to the manner of it.

10. But besides the circumstances requisite to denominate a levying of war in respect of the manner of it, there is also requisite to make a treason within this clause, that it be a levying of war *against the king*, which is the scope, end and termination thereof, for, as hath been said, there may be a levying of war between private persons upon private quarrels, which is not a levying of war against the king, and so not treason within this clause of this act.

11. A levying of war against the king therefore is of two kinds, either expressly and directly, or by way of interpretation, construction or exposition of this act: the former is, when a war is levied against the person of the king, or against his general, or army by him appointed, or to do the king any bodily harm, or to imprison him, or to restrain him of his liberty, or to get him into their power, or to enforce him to put away his ministers, or to depose him; many instances of this kind may be given, such as was in truth the riding of the earl of *Essex* into *London* armed with swords and pistols, his solliciting of the citizens to go with him to court to remove from the queen her ministers and counsellors, his fortifying of his house against the queen's officers, which were in truth a levying of war, tho' his indictment was upon the first clause of compassing the queen's death, which was more clearly included within these actions.

12. Constructive or interpretative levying of war is not so much against the king's person, as against his government: if men assemble together *more guerrino* to kill one of his majesty's privy council, this hath been ruled to be levying of war against the king. *P. 16 Car. 1. Cro. 583.* *Bentley's case before cited*, and accordingly was the resolution of the house of lords *17 R. 2. Talbot's case above-mentioned*.

So in the case mentioned by my lord *Coke* in the time of [153] *H. 8. Co. P. C. p. 10.* levying war against the statute of *Labourers* and to enhance servants wages was a levying of war against the king; and altho' levying of war to demolish some *particular inclosures* is not a levying of war against the king, *Co. P. C. p. 9.* yet if it be to alter religion established by law, or to go from town to town generally to cast down inclosures, or to deliver generally out of prison persons lawfully imprisoned, this hath been held to be levying of war against

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against the king within this act, and the conspiring to levy war for those purposes treason within that clause of the act of 13 Eliz. cap. 1. as was resolved in *Burton's case* and *Grant's case* above-mentioned; and the like resolution was in the case of the apprentices that assembled *more guerrino* to pull down bawdy-houses.

It is considerable how these resolutions stand with the judgment of parliament in 3 & 4 Ed. 6. cap. 12. which makes special provisions to make assemblies above twelve to alter the laws and statutes of the kingdom, or the religion established by law, or if above forty assemble for pulling down inclosures, burning of houses, or stacks of corn, treason, if they departed not to their homes within an hour after proclamation, or after proclamation put any of these designs in practice, which is nevertheless reduced to felony within clergy by the statute of 1 Mar. Jeff. 2. cap. 12. These offenses being the same with those adjudged treason in *Burton's case* and some others before cited, why was it thought necessary for an act of parliament 3 & 4 Ed. 6. to make it treason under certain qualifications, and why reduced to felony within clergy by the statute of 1 Mar. cap. 12. and the statute of 3 & 4 E. 6. repealed? It seems that altho the unlawful ends of these assemblies thus punished by 3 & 4 Ed. 6. and 1 Mar. were much the same with those of *Burton* and *Grant* and others, that were adjudged treason, yet the difference between the cases stood not in that, but in the manner of their assembly; those that were adjudged treasons in *Burton's* and *Grant's case* were, because it was a conspiracy to arm themselves and levy a war *more guerrino*.

But those, that were thus heightened to treason by 3 & 4 E. 6. and reduced to felony by 1 Mar. were not intended of [154] such, as were *more guerrino arraiati*, nor a levying of war, tho their multitudes were often great, and tho they did put in ure the things they conspired to effect, and so were but great riots and not levying war within this clause of 25 E. 3. and therefore those acts inflicted a new and farther punishment to them.

III. *En son realme*: hitherto it hath been said what is a levying of war; we are now to consider the place, *En son realme*.

The realm of *England* comprehends the narrow seas, and therefore if a war be levied upon those seas, as if any of the king's subjects hostilely invade any of the king's ships, (which are so many royal castles) this is a levying of war within his realm, for the narrow seas are of the liegeance of the crown of *England*: *vide Seldeni Mare clausum*.

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And this may be tried in the county next adjacent to the coast by an indictment taken by the jurors for that county before special commissioners of eyer and terminer, *de quo vide infra*, and in the chapter of piracy: *vide 5 R. 2. Trial 54.*

It is true, before the statute of 28 H. 8. cap. 15. those treasons were usually inquired and tried by special commission, wherein the admiral and his lieutenant were named, as likewise other felonies committed upon the sea.

But divers instances were in the time of E. 3. whereby such offenses upon the sea were punished as treason or felony in the king's bench. 40 Aff. 25. A *Norman* captain of a ship robs the king's subjects upon the sea, he being taken was hanged as a felon, but the *English* that assisted him were drawn and hanged as traitors; and by the statute of 28 H. 8. cap. 15. there is a direction of a special commission to try them in such counties or places as shall be assigned by such commission according to the method of trials of such offenses at the common law, but before that statute they might be tried by special commission at the common law, and according to the course of the common law; but of this *alibi in tractatu de Admiralitate*.

[155] For treasons and other capital offenses in *Scotland* there is a provision made by the statute of 4 Jac. cap. 1. and 7 Jac. cap. 1.

Ireland, tho part of the dominions of the crown of *England*, yet is no part of the realm of *England*, nor *infra quatuor maria*, as hath been ruled temp. E. 1. *Morrice Howard's* case: the like is to be said for *Scotland* even while it was under the power of the crown of *England*, as it was in sometimes of E. 1. and some part of the time of E. 3. & Rich. 2. *Continual claim* 13.

For *Ireland* hath the same laws for treason that *England*, tho it hath some more; yet for a levying war, or other treason in *Ireland* the offender may be tried here in *England* by the statute of 35 H. 8. cap. 2, for treasons done out of the realm, as was resolved in the case of *O-Rork*, H. 33, Eliz. (*) and after that in Sir *John Perrot's* case (f), Co. P. C. p. 11. 7 Co. Rep. *Calvin's* case, 23, a.

In the case of the lord *Macguire* (g) an *Irish* peer, who was indicted in *Middlesex* for high treason for levying war again the king in *Ireland*, he pleaded to the indictment, that he was one of the peers and

(*) *Comd. Eliz.* p. 458.

(f) See his trial in *State Tr. Vol. I. p. 181.*

(g) *State Tr. Vol. I. p. 228.*

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lords of parliament in *Ireland*, and demanded judgment, if he should be arraigned in *England* for a treason committed in *Ireland*, whereby he should lose the benefit of trial by his peers ; but it was resolved, 1. That for a treason in *Ireland* a man may be tried here in *England* by the statute of 35 H. 8. for it is a treason committed out of the realm. 2. That altho' *Macguire*, if tried in *Ireland* for his treason, should have had his trial by his peers, as one of the lords in parliament, which he cannot have here, but must be tried by a common jury, yet that altered not the case ; he was therefore put upon his trial by a *Middlesex* jury, and was convicted and had judgment, and was executed. *H. 20 Car. I. B. R.* so that the opinion *20 Eliz. Dy. 360. b.* was ruled no law : *vide Co. Litt. 261.*

And the same that is said of *Ireland* may be said in all particulars of the isle of *Man*, *Jersey*, *Guernsey*, *Sark*, and *Al-derney*, which are parcel of the dominions of the crown of *England*, but not within the realm of *England* as to this purpose concerning treason ; yet they have special laws of their own applicable to criminals and jurisdiction for their trials : as touching treason committed in *Wales* before the statute of 26 H. 8. cap. 6. no treason, murder, or felony committed in *Wales* was inquirable or triable before commissioners of *oyer and terminer*, or in the king's bench in *England*, but before justices or commissioners assigned by the king in those counties of *Wales* where the fact was committed. *P. 2 H. 4. Rot. 18. Salop'* :
" *Johannes Kynaston indictatus fuit quod ipse consentiens fuit ad falsam*
" *& proditiosam insurrectionem Owain Glyndour & aliorum Wallico-*
" *rum, & sciens de toto proposito eorundem, qui proditiosè combusserunt*
" *villas de Glyndour Dynby, &c. & quod proditiosè misit Johannem*
" *filium suum bēnē armatum & arraiatum pro guerrā & Willielmum*
" *Hunte sagittarium ad prædictum Owain & exercitum Wallicorum,*
" *&c. dicit quod prædictæ villæ, in quibus supponitur prodiciones præ-*
" *dictas factas fuisse, sunt infra terram Walliæ & extra corpus com-*
" *Salop' & legem terra Angliæ, unde non intendit quod dominus rex de*
" *proditionibus prædictis in hoc casu ipsum impetrare velit, seu ipsum po-*
" *nere velit inde responsuram, & quia plenariè & certitudinaliter testifi-*
" *catur est, quod prædictæ villæ sunt infra terram Walliæ & extra*
" *corpus comitatus Salop' & legem terra Angliæ, & Thomas Covelle*
" *attornatus ipsius regis coram ipso rege inde examinatus hoc non dedit,*
" *& sic justiciarii ad inquirendum de proditionibus prædictis infra Wal-*
" *liam factis virtute commissionis prædictæ inquirere minimè potuerunt*
" *nec*

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" nec preditionis prædictæ sic in terrâ Walliæ facta per legem terræ
 " Angliæ triari nec terminari possunt, consideratum est, quod quoad
 " prædictas preditiones prædictus Johannes Kynaston eas inde quietus,
 " &c." But it is true by the statute of 26 H. 8. cap. 6. counterfeiting
 of coin, washing, clipping or minishing the same, felonies, mur-
 ders, wilful burnings of houses, manslaughters, robberies, burglaries,

[157] rapes, and accessaries of the same and other offenses feloniously done in *Wales* (*h*), or any lordship marcher may be inquired of, heard and determined before the justices of goal-delivery and of the peace and every of them in the next adjacent county: this act is confirmed by the great statute of *Wales* 34 & 35 H. 8. cap. 26. which settles the grand sessions and justices thereof, and gives the justices of the grand sessions power to hold all manner of pleas of the crown, and to hear and determine all treasons, felonies, &c. within the precinct of their commissions, as fully as the court of king's bench may do in their places within the realm of *England*; so that as to those offenses enumerated in the statute of 26 H. 8. the justices of gaol-delivery in the adjacent counties, *viz.* *Gloucester*, *Hereford*, *Salop* and *Wigorn*, had thereby a concurrent jurisdiction with the justices of the grand session (*i*).

But whether the statute of 26 H. 8. extended to treason for compassing the king's death or levying of war (*k*), or whether the same remained only triable by the justices of the grand sessions, seems doubtful, and the rather, because that statute is not construed by equity, and therefore it extends not to an appeal of murder in an adjacent county, and so it was adjudged *Hil. 7 Car. B. R. Sently and Price* (*l*); but at this day 26 H. 8. cap. 6. stands repealed by 1 & 2 Ph. & M. cap. 10. as to the trials of treason (*m*).

It is true, that in other criminal causes, that are not capital, as in cases of indictments of riots, they may be removed by *certiorari* into the king's bench, and when issue is joined they may be tried in the next *English* county, *T. 16 Jac. Sir John Carew's case* (*n*) and divers

(*b*) For this act extends to all the antient counties of *Wales*, as well as the lordships marchers; and so it was resolved in *Abbot's case* for a murder in *Pembroke*. *T. 9 Geo. I. B. R.*

(*i*) *1 Mod. 64, 68.*

(*k*) It should seem that it did not, and that was one reason of making the statute of 32 H. 8. cap. 4. whereby all treasons or misprisions of treasons committed in *Wales* may be presented and tried in such

shires and before such commissioners as the king shall appoint, in like manner as if the facts had been committed in such shires,

(*l*) *Cro. Car. 247. W. Jones 255.*

(*m*) The 1 & 2 Ph. & M. reducing all trials for treason to the order and course of the common law is a virtual repeal of 26 H. 8. and by the same reason of 32 H. 8. also as to treason.

(*n*) *Cro. Jac. 484. 2 Rel. 28. 1 Rel. Abr. 394.*

others.

others, as well as in a *quo minus*, which is at the king's suit: but whether a *certiorari* lies into *Wales* upon an indictment of treason or felony hath been doubted *M. 9 Car. B. R. Chedley's case* (*o*): it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency or to plead his pardon, but not as to trial of the fact (*p*), but it shall be sent down by *mittimus* according to the statute of 6 *H. 8. cap. 6.* because it is in a manner essential for felony or treason to be tried in the proper county, unless where a statute particularly enables it, which it did in the case of 26 *H. 8.* only whilst it was in force, where the indictment as well as the trial is in the adjacent county.

But certainly *Wales* is within the kingdom of *England* (*q*), and therefore not within the statute of 35 *H. 8. cap. 2.* for trial of foreign treasons.

If a felony or treason be committed in *Durham*, a *certiorari* lies to remove it into the king's bench out of *Durham* directed to the justices of peace, *oyer* and *terminer*, or gaol-delivery there; for since the statute of 27 *H. 8. cap. 24.* they are all made by the king's commission, and so the proceedings before them are his own suit, and thus it was done in *Ruttabie's case* (*r*) upon debate; but if the party plead not guilty it shall be sent down thither to be tried, as was done in that case. *T. 1653.* They of *Durham* claim a privilege not to be sworn out of the precinct of the county palatine. *Vide* the statute of 2 *H 5. cap. 5.* 9 *H. 5. cap. 7.* 11 *H. 7. cap. 9.* for treasons and felonies in *Tindal* and *Hexamshire*.

And thus far concerning treason in levying of war against the king.

See Foster's discourse of High Treason per totum, and 1 Hawk. P. C. ch. 17. of High Treason, and Kelyng's Rep 7. &c. High Treason, 2 Bur. 643 to 652. Kelyng, 75. 2 Black. Com. ch. vi. p. 88. 2. Wilton, 365.

(*o*) *Cro. Car. 331.*

(*p*) But yet it has been done in felony as to the trial of the fact, as in the case of *Morris*. 1 *Yea. 93, 146.* *Herbert's case*,

Lanch. 12.

(*q*) 2 *Ro. 28.*

(*r*) *Vide infra*, p. 467. and *Part II. p. 220.*

CHAP. XV.

Concerning treason in adhering to the king's enemies within the land or without.

THE words of the statute of 25 E. 3. go on, *viz.* *Ou fait aidant al enemies nostre dit seigneur le roy en son roialme donant a eux ayd ou comfort en son roialme ou per ailliors.*

I. Therefore we shall inquire what shall be said *enemies of the king*: those that raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors, the latter are those, that come properly under the name of enemies.

This gives us occasion to consider somewhat of the nature of war and peace.

The power of making war or peace is *inter jura summi imperii*, and in *England* is lodged singly in the king, tho it ever succeeds best when done by parliamentary advice.

Peace is of two kinds, *viz.* 1. Positive and contracted. 2. Such a peace, as is only a negation or absence of war: that peace, which I call positive, is such as ariseth by contracts, capitulations, leagues, or truces between princes or states, that have *jura summi imperii*, and is of two kinds: 1. Temporary, which is properly a truce, which is a cessation from war already begun, and then the term being elapsed the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual, *sine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a league *fœdus*, and makes the princes and states *confœderati*, and tho this may be vari-
[160] ously diversified according to the capitulations, conditions and qualifications of such leagues, yet they are ordinarily of these kinds: 1. Leagues offensive and defensive, which oblige the princes not only to mutual defense, but also to be afflicting to each other in their military aggresses upon others, and makes the enemies of one in effect the common enemies of both. 2. Defensive, but not offensive, obliging

obliging each to succour and defend the other in cases of invasion or war by other princes. 3. Leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions, tho this may be diversified according to such contracts as are made in such leagues; and therefore in the league between king *James of England* and the king of *Spain* there was a tacit exception on the part of the *Spaniard* by the wary penning of the articles, whereby the freedom of our trade into the western plantations of the king of *Spain* hath been supposed by the *Spaniard* to be restrained.

2, A peace, which is only a negation or absence of war, is that which I call a negative peace, because it is only an absence or negation of war, there intervening no league nor articles of peace, nor yet any denunciation of war, for it is regularly true, *ubi bellum non est, pax est*, tho neither prince is under any capitulation or contract; for there are divers princes in the world, that never capitulated one with another, and yet there is no state of war between them; and therefore the war by the *Spaniards* upon the *Indians*, tho under pretense of religion, without any just provocation hath been held injurious and an unjust aggression, tho there intervened no former articles of peace between them.

War was antiently of two kinds, *bellum solemne vel non solemne*: a solemn war among the *Romans* had many circumstances attending it (*a*), and was not presently undertaken upon an injury received without these solemn circumstances. 1. *Clarigatio* (*b*) or demanding [161] reparation for the injuries received. 2. That being not done there followed induction or denunciation of war. 3. Dilation or a space of thirty-three days before actual hostility was used; but most times necessity and politic considerations both among them and other nations did dispense with these solemnities, which were found often-times too cumbersome and inconvenient, especially where the delays might occasion surprizal or irreparable damage to the commonwealth, as where the adverse party made preparations, which, if not suddenly repressed, might prove more dangerous and irresistible.

But these solemn denunciations of war had place only in offensive or invasive wars, and even then had many exceptions.

(*a*) See the manner of it described by *Dionys. Hal. Lib. II. Agel. Lib. XVI. cap. 4.* and *Liw. Lib. I. §. 32.* whereby it appears, that the thirty-three days of dilation intervened between the demanding reparation and the induction.

(*b*) See *Plin. Lib. XXII. cap. 2.*

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1. If a war be actually between two princes or states, and a temporary truce be made as for a year or two, that term being elapsed they are in a state of war without any denunciation, for they are in the former condition, wherein they were before the truce made.

2. In case a foreign prince in peace violate that peace and becomes the aggressor, or invades the other, tho without any denunciation, the prince that is upon his defense was not bound, neither was it necessary for him to make a solemn denunciation or proclamation of war, for this solemnity of denunciation was thought only requisite on the part of the aggressor.

3. If after reparation of injuries sought, instead of reparation of the former, new are committed by the adverse prince, as killing of an ambassador, contemptuous rejection of all reparation or mediation touching it, great provisions of hostility, or the like, there, this denunciation or dilation was not requisite in the aggressor; but when all is done, supreme princes or states take themselves to be judges of public injuries, and of the manner, means and seasons for their reparations, and what they judge safest and most for their advantage is most commonly done in these cases, and they seldom want fair declarations to justify themselves therein.

[162] And therefore whether these handsome methods be observed or not, yet if *de facto* there be a war between princes, they and their subjects are in a state of hostility, and they are in the condition of enemies (*hostes*) to each other; but now for the most part these antient solemnities are antiquated, I come therefore to the practice of our own country and modern arms, and what we may observe from our own books, history, and monuments.

We may observe in the wars we have had with foreign countries, that they have been of two kinds, *viz.* special and general: special kinds of war are that, which we usually call *marque* or reprisal, and these again of two kinds, 1. Particular, granted to some particular persons upon particular occasions to right themselves, for which *vide* statute 4 H. 5. cap. 7. but this is not the proper place to treat touching it. 2. General *marque* or reprisal, which tho it hath the effect of a war, yet it is not a regular war, and it differs in these two instances: 1. Regularly it is not lawful for any person by aggression to take the ship or goods of the adverse party, unless he hath a commission from the king, the admiral, or those that are specially appointed thereunto. 2. It doth not make the two nations in a perfect state of hostility

hostility between them, tho they mutually take one from another, as enemies, and many times in process of time these general reprisals grow into a very formed war: and this was the condition of the war between us and the *Dutch* 22 February anno 1664. the first beginning whereof was by that act of council, which instituted only a kind of univerial reprisal, and there were particular reasons of state for it; but in process of time it grew into a very war, and that without any war solemnly denounced; and therefore by the statute of 17 Car. 2. cap. 5. *Doleman* and others, that were in *Holland*, were declared to have traitorously adhered to the king's enemies, and were attainted of treason, unless they rendered themselves by a day certain, and all others, that served the states of the united provinces during the continuance of the war, soldiers or seamen, by sea or land, and not returning by a time certain, were attainted of treason; and this had all the effects of war and hostility: the goods of the *English* taken by the *Dutch* and [163] brought *intra praefidia* the property was wholly changed, and tho retaken again, should not be restored again to the first owner, according as in captures by enemies, 7 E. 4. 14. 22 E. 3. 16. and so it was practised during that war.

A general war is of two kinds: 1. *Bellum solemniter denuntiatum*, or *bellum non solemniter denuntiatum*; the former sort of war is, when war is solemnly declared or proclaimed by our king against another prince or state; thus after the pacification between the king and the *Dutch* at *Breda*, upon new injuries done to us by the *Dutch* the king by his printed declaration 1671. declared war against them; and this is the most formal solemnity of a war, that is now in use.

A war that is *non solemniter denuntiatum* is, when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us; the first *Dutch* war was a real war, and yet it began barely upon general letters of *marque*: again, if a foreign prince invades our coasts, or sets upon the king's navy at sea, hereupon a real, tho not solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to *England*, or to prove a person to be an *alien enemy*, there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not; and therefore P. 31 Eliz. in justice *Owen's* reports (c), in an action of debt the defendant pleaded, that the plaintiff was an *alien* born in *Gaunt* under the obedience of the king of

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Spain, enemy of the queen, the plea was ruled good, tho he shewed not, that any war was proclaimed between the two realms; and according is the pleading 7 E. 4. 13. *Rafel's Entries, Trespass per alien* (*d*).

And in very deed there was a state of war between the crowns of *England* and *Spain*, and the *Spaniards* were actual enemies, especially after the attempt of invasion in 88. by the *Spanish Armada*, and yet there was no war declared or proclaimed between the two crowns, as [164] appears by *Camden sub anno 31.* (*e*) *ibidem p. 404.* & *ibidem p. 466.* (*f*) so that a state of war may be between two kingdoms without any proclamation or induction thereof or other matter of record to prove it.

And therefore in the case in question touching treason it shall upon the trial be inquired by the jury, whether the person, to whom the party indicted adhered, were an enemy or not, and in order to that, whether there were a war between the king of *England* and that other prince, whereunto the party adheres, this is purely a question of fact and triable by the jury, and accordingly is the book 19 E. 4. 6. and the reason is plain, because it may fall out, that tho there were a league between the king of *England* and a foreign prince, yet the war may be begun by the foreign prince: again, suppose we, that the king of *England* and the king of *France* be in league, and no breach thereof between the two kings, yet if a subject born of the king of *France* makes war upon the king of *England*, a subject of the king of *England* adhering to him is a traitor within this law, and yet the *Frenchman*, that made the war, is not a traitor but an enemy, and shall be dealt with as an enemy by martial law, if taken: this was the case of the duke of *Norfolk* adhering to the lord *Herife* a subject of the king of *Scots* in amity with queen *Elizabeth*, that made an actual invasion upon *England* without the king's commission. *M. 13 & 14 Eliz. Co. P. C. p. 11. Camd. Eliz. sub anno 1571* (*g*), *14 Eliz. p. 175.* and the case of *Perkin Warbeck* a *Frenchman*, *7 Co. Rep. Calvin's case* (*h*). *6 Dy. 145. a Sherly's case* (*i*); so that an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility.

II. In the next place I shall consider what shall be said a *person adhering*, and also what shall be *adhering*.

(*d*) *Raf. Extr. p. 605. d. 252. b.*

(*e*) *vix. 1588.*

(*f*) *sub anno 1592.*

(*g*) And also *sub anno 1571. In principio.*

(*h*) *7 Co. 6. b.*

(*i*) *7 Co. Calvin's case 6. a.*

If a foreign prince be in actual war against the king of *England*, any subject of that prince under his protection is presumed to be adhering to him; but he is not a person within this act, for if he [165] be taken, he shall be dealt with as an enemy, *viz.* he shall be ransomed, and his goods within this realm seized to the used of the king. When king *John* was deposed of the duchy of *Normandy* by the king of *France*, and thereupon the *Normans* forsook the allegiance of the king of *England*, which was due to him, as duke of *Normandy*, all the lands of the *Normans* in *England* were seized into the king's hands, and thence grew first the escheat *de terris Normannorum* mentioned *prerogativa regis* (*k*) cap. 12. and the style of such forfeiture was usually, *quia recepsit à servitio nostro & adhaesit inimicis nostris in Normannia*, *Claus. 6 John. m. 19. pro Eustachia uxore Lurce fil' Johannis, Claus. 8 John. m. 5. pro Abbe Cluniacensi*: see the reason thereof before cap. 10. they were *ad fidem utriusque regis*.

If there be war between the king of *England* and the king of *France*, those *Englishmen*, that live in *France* before the war, and continue there after, are not simply upon that account adherents to the king's enemies, unless they actually assist him in his wars, or at least refuse to return upon privy seal, or upon proclamation and notice thereof into *England*; and this refusal, tho' it is an evidence of adherence, seems not to be simply in itself an adherence: this appears plainly by the statute of *Magna Charta*, cap. 30.

If a subject of a foreign prince hath lived here in *England* under the protection of the king of *England*, and so continues after a war proclaimed, and partakes of all the benefits of a subject, and yet secretly practiseth with the king of *France*, and assists him before he hath left this kingdom, or openly renounced his subjection to the crown of *England*, this man seems to be an adherent within this act, and commits treason thereby: *tamen quare, vide Dy. 144.* a *Sherley's case*; and the like law seems to be of an enemy coming hither and staying here under the king's letters of safeconduct: *quare, vide* statute 18 *H. 6. cap. 4. 20 H. 6. cap. 1.*

If there be a war between the king of *England* and *France*, and then a temporary truce is made, and within the time of that truce an *Englishman* goes into *France*, and stays there and returns [166] before the truce is expired, this is not an adherence to an enemy within this statute, *Claus. 7 E. 3. part 1. m. 9. pro Johanne*

(*k*) 17 *E. 2.*

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L

Poynter,

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Poynter, who had an *amovebas manus cum exitibus*, his lands having been seized for that cause: but this record implies, that if during his stay (it was in Scotland) he had confederated or conspired with the enemy or assisted them in order to their further hostility, this might have been an adherence: *nota*, the reason, “*Quia p̄d̄ctus Johannes tempore tr̄garum inter patrem nostrum & Robertum de Bruys ivit in Scotiam per pr̄ceptum Andreæ de Harcla ad p̄tandum quandam imaginem, quo tempore bene licuit unicuique de Angliâ intrare in Scotiam per licentiam & literas de conductu custodis Marchiæ, & quod idem Johannes habuit tales literas Andreæ de Harcla, & ibidem taliter moram fecit per unum annum absque eo, quid aliquo tempore Scotis p̄d̄ctis fuit adhærens, & quod idem Johannes rediit in Angliam durantibus tr̄ngis p̄d̄ctis, & semper hactenùs fuit ad pacem nostram & patris nostri.*” *Nota*, this Andrew Harcla having been created earl of *Carlisle* was by an extrajudicial military sentence first degraded, and then had judgment of high treason given against him. *H. 18 E. 2. Rot. 34 in dorso rex (1).*

If

(1) This sentence of degradation, as well as the judgment for high treason, were pronounced at *Carlisle*, before Sir Ralph Bassett, Sir John Paccbe, Sir John de Wijham and Geoffrey le Scrop, who, together with the earl of *Kent* the king's brother and *John de Hastings*, were specially constituted by letters patent, *Juſſicari ad degradandam Andream de Harcla comitem Carlionii, inimicum & proditorum regis & regni fui, quem super in comitem gladio cinxerat, & ad iudicium de ipso super degradatione, inimicitia & seditione p̄d̄ctis pronunciandum & redendum;* and the form of the said judgment to be pronounced was at the same time sent to the said justices in a certain schedule, *sub pede ſigilli regis*, the which judgment was accordingly pronounced in the following words: “*Pur ceo q̄ nostre ſeignor le roi pur le graunt bien valu & loualte, qu'il entendit davour trove en vous Andreæ de Harcla pur aider & meyntener les dreytoures & les droitz de la couronne & de soun peuple, contre ſes enemys de tous parts, & nomēment contre Robert de Brus & ſes autres enemys d'Escocce, vous fist conte de Cardeil, & de la meyn vous feyns [crys] d'Escocce, & vous dona fee de la counte, chasteux, villes, terres & tenementz, pur votre eſtat meyntener, come conte; & apres cto q̄ vous aviez tiel honour, & bien fait reſeu de noſtre dit ſeignor, li elles alez [alliez] au dit Robert de Brus, tretroulement, faulement & malveiſement, par écrit & par ferement,*

pur meyntener le dit Robert d'être ſoi d'Escocce, proprement en la reverſe de la entencion le roi, pur queſo il vous fit conte; par queſo agarde cete court, q̄ vous foietz degradee, & q̄ vous perdetz ſoun de conte pur vous & pur vos heires a toutz jours, & q̄ vous foietz deceynt del eſpeye & q̄ vos eſporans d'orrez ſoient coupes de talouns; & pur ceo q̄ vous Andreæ, homme lige noſtre ſeignour le roi, contre voſtre homage, ſoi & ligeaunce, en contre voſtre ſeignour lige, etes aliez, tretroulement, faulement & malveiſement, a Robert de Brus, enemy mortel a noſtre ſeignour le roi & de ſoun realme & a ſoun poeple, par ferement & par écrit, por meyntener au dit Robert & a ſes heires le roialme d'Escocce enterement, a tut voſtre force & power, contre toutes gentz, & q̄ vous nomeretſ ſi hommes, & le dit Robert autre ſi, les queuz duſke ordeynemēt, de toutes les groſſes beſouignes de roialme d'Eſgleture de d'Escocce, & q̄ leur ordéinemēt ſe tendroit en tous poynz, & ſi nul, de quel eſtat ou condictio[n] qu'il fuſt, vousit countredire le dit ordéinemēt en nul poynz, que vous ove toute voſtre force & power, [lui] curries feur, & en taunte eſpreſſies, tretroulement, faulement & malveiſement d'empredre roial power, contre voſtre ſeignour lige, les piers & les people du roialme, pur eux mettre en ſubjeſſion, & al ordinaunce de vous, & du dit Robert, qui est commun enemny au roay & au roialme,

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If the king of *England* and the king of *France* be in amity, yet if a subject of the king of *England* solicits by letters the king of *France* to invade this realm, this is high treason: it was the case of cardinal *Poole*, who wrote a book to that purpose to *Charles* the emperor. *Co. P. C.* p. 14. It is certainly an overt-act to prove treason in compassing the king's death, but it seems not an overt-act to convict him of adhering to the king's enemies, for at the time of this act done the emperor was not an enemy. *Co. P. C.* p. 14.

If an *Englishman* during war between the king of *England* and *France* be taken by the *French*, and there swear fealty to the king of *France*, if it be done voluntarily, it is an adhering to the king's enemies; but if it be done for fear of his life, and that he returns, as soon as he might, to the allegiance of the crown of *England*, this is not an adherence to the king's enemies within this act. *Claus.* [168] *7 E. 3. part 1. m. 15.* *John Culwin's* land being seized upon this account there was *ouster le main cum exitibus*, "Quia compertum est per in-
" quisitionem, &c. quod Johannes ad fidem & pacem nostram extitit, quod-
" que idem Johannes captus fuit de guerrâ per Scotos inimicos nostros,
" & in prisonâ in Scotiâ per dictos inimicos nostros, & pro vita sua
" salvandâ ad fidem dictorum Scotorum per dimidium annum extitit,
" quodque idem Johannes postea in Angliam redit, & ad fidem & pa-
" cem nostram a tempore prædicto hæcenus extitit;" tho this was before
25 E. 3. yet the instance is useful, because adhering to the king's
enemies was then treason.

If a captain or other officer, that hath the custody of any of the king's castles or garrisons, shall treacherously by combination with the king's enemies, or by bribery or for reward deliver them up, this

" roialme, & a cest tresoun, faufme, mal-
" veiste & treitrouse aliaunce meyntenir,
" feistes le poeple nostre seignour le roi
" jurer, ea ettraunt le dit poeple a vous,
" taunt come en vous feuls, pour meynte-
" nir la dite tresoun, faufme, malveiste &
" treitrouse aliaunce susdites, les queux
" sount notories & conuz en le ro-
" alme, & nostre seignour le roi le re-
" corde; par quel agarde ceste court, qe
" por le dite tresoun soietz treynez &
" penduz & decole, & qe voftre quer,
" bouels & entrayles, douant les treitrouses
" penfes vindrent, soient araceez, ar en
" poudre, & le poudre ventee, & qe voftre
" corps soit coupee en quatre quarters,
" d'ount l'un quarter sount [soit] pendu
" amount de latour de Cardoil, un autre
" quarter amount de la tour de Novel
" Gabel, le terce feur le pount de Ever-

" wyck & le quartre a Salopp' & voftre telle
" feur le pount de Loundres, por ensemple
" qe autres n'empreignent a faire tieux
" treasons a lour seigneur lige, & dictum
" est vicecomiti Cambriae quod faciat inde
" executionem."

This whole proceeding was returned in to chancery upon a *certiorari*, and from thence sent by *mittimus* into the king's bench there to be enrolled *ad perpetuam rei memoriam*; by this it appears, that it was not a military but designed as a judicial sentence, altho it scarce deserves that name, being throughout irregular and illegal, for that the party was not admitted to a trial, nor indeed had the commissioners power to try, their commission being (not *ad audiendum & terminandum* but) only *ad degradandum & ad judicium redditum & pri-
mogenitum*.

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is adherence to the king's enemies. This was the case of *William Weston* for delivering up the castle of *Oughtrewicke*, and *John de Gomeney* for delivereing up the castle of *Ardes* in *France*, both which were impeached by the commons, and had judgment of the lords in parliament, *Rot. Par. 1 R. 2. n. 40.* namely *William Weston* to be drawn and hanged, but execution was respited, *que le roy n'est uncore en forme del manner de cest judgement*: *Gomeney's* judgment was thus, *Les seigneurs ix plein parlement vous adjugent a la mort, & pur ceo qu'eesgentlehome & banneret & aves serve le aiel le roy en ses guerres, & n'eeslig home nostre seigneur le roy, vous seres decolle sans autre justyce auer*, but execution was respited (*m*).

And note, tho the charge were treason, and possibly the proofs might probably amount to it, and *Walsingham sub anno 1 R. 2.* tells us it was done by treason; yet the reason expressed in the judgment against *Weston* is only, *que surrendis le dit castle de Oughtrewicke al enemies nostre seigneur le roy avant dits sans nul dureffe ou defalt de victualls contre vous ligeance & emprise*: and the like reason is express in the judgment against *Gomeney*, *Vous emprists a sauement garder [169] sans les surrendy a nully, &c. & ore vous Johan sans nul du- resce ou defalt de victualls ou de artillery ou autres choses necef- saries pur le defence de dits ville & castle de Arde sans commandement nostre seigneur le roy malement l'auets deliveris & surrendres al enemies nostre seigneur le roy per vostre defalt demesne contre tout plain de droit & reason, & encountre vestre emprises suisdits, &c.*

The truth is, if it were delivered up by bribery or treachery, it might be treason, but if delivered up upon cowardice or imprudence without any treachery, tho it were an offense against the laws of war, and the party subject to a sentence of death by martial law, as it once happened in a case of the like nature in the late times of trouble (*n*), yet it is not treason by the common law, unless it was done by treachery; but tho this sentence was given *in terrorem*, yet it was not executed: it seems to be a kind of military sentence, tho given in parliament, like unto that of the baron *Graystock* governor of *Berwick* (*o*), who travelled into *France* without the king's commandment, and left the care of the garrison to *Robert de Ogle* a valiant knight, who used all imaginable courage in defense thereof, but it was lost in the ab-

(m) See these cases *State Tr. Vol. I. p. 795.*
(n) This was the case of Col. *Fenner*, parliament governor of *Bristol* for cowar-

ly surrendering the same to the king's forces. See *State Tr. Vol. I. p. 745.*
(o) See this case *State Tr. Vol. I. p. 797.*

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sence of the baron of *Greyflock*, who was thereupon sentenced to death, because he had undertaken that charge, and yet went from it without the king's command, and in his absence it was lost: this also seems rather a sentence of council of war, than a judgment of high treason; and thus far touching the treason of adhering to the king's enemies within the land and without.

Touching the trial of foreign treason, *viz.* adhering to the king's enemies, as also for compassing the king's death without the kingdom at this day, the statutes of 35 H. 8. cap. 2. hath sufficiently provided for it (*p.*) *P. 13 Eliz. Dyer*, 298, 300. *Story's case*; but at [170] common law he might have been indicted in any county of *England*, and especially where the offender's lands lie, if he have any. *5 R. 2. Trial 54.*

And it seems, if the adhering to the king's enemies were upon the narrow seas, this is an adherence to the king's enemies within the realm, and tho' it be triable by a special commission at this day grounded upon the statute of 28 H. 8. yet at common law it might have been indicted and tried in any adjacent county by a special commission of *oyer and terminer*, for the narrow seas are within the king's allegiance, and part of the realm of *England*. *6 R. 3. Protection 46. Co. Lit. 260.*

Tort. 197. 217. 218. 219: 220. and see his Disc. I. ch. ii. per tot. 4 Black. Com. ch. vi. §2. 83. 1 Black. Com. ch. vii. p. 257.

(*p.*) This statute gives power to try such treasons in the king's beach or by commissioners in any county appointed by the commission, and continues in force notwithstanding 1 & 2 Pb. & Mar. cap. 10. which reduces the methods of trial for

treason to the course of the common law, because it is not introductory of a new law, but only settles a point, that was before doubtful at common law; and it was accordingly so resolved in *Story's case*, *Dyer 298. b. Co. P. C. p. 24.*

C H A P. XVI.

Concerning treason in counterfeiting the great seal or privy seal.

FIRST, I shall upoa this article consider how the common law stood before this statute, and what kind of offense this was anciently, and how punished. **Secondly**, I shall consider how the law hath been taken touching this offense since the statute, and how punished.

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I. The great seal of *England* is the great instrument, whereby the king dispenseth the great acts of his government and the administration of justice; under this seal the great commissions to his justices and others are passed; original writs and mandates, and those processes that issue out of chancery, all the king's grants and charters of lands, liberties, franchises, honours, pardons are passed under this seal.

[171] There is or should be always a *memorandum* made upon the close rolls of the breaking of the old seal and making and delivering of the new; and by the very delivery of this seal the office of keeper of the great seal is constituted, and most ordinarily is to the same person, that is lord chancellor: sometimes the custody of the great seal is in one person, and the office of lord chancellor in another; but always a *memorandum* of the delivery thereof entered upon the close rolls. The great seal consists ordinarily of two impressions, the one the very great seal itself with the king's effigies instamped on it, the other is commonly called *pes sigilli*, and sometimes in our old books called *le targe*, which is the impression of the king's arms in the figure of a target, which is used in matters of smaller moment as certificates, which are usually pleaded *sub pede sigilli*.

Antiently, when the king travelled into *Normandy*, *France*, or other foreign kingdoms upon occasion of war or the like, there were two great seals, one went along with the king, the other was left with the *custos regni*, or sometimes with the chancellor, if he went not along with the king, for the dispatch of the affairs of the kingdom, and then the king upon his return sometimes redelivered the old seal and took in the new, *Clasf. 20 E. 3. part 2. m. 26. dorſ. Clasf. 19 E. 3. part 2. m. 23 & 10. dorſ. Clasf. 20 E. 3. part 2. m. 18. dorſ. & frequentissimè alibi in dorſo clausorum.*

The *privy* seal is ordinarily a warrant for the passing of things under the great seal, sometimes a warrant to issue treasure, to make allowances, &c. vide 11 Co. Rep. 92. the earl of *Devonshire*'s case; and this seal is ordinarily in the custody of the lord keeper of the privy seal or commissioners thereunto appointed.

Besides these seals of greater moment there are other seals of the king, as the *privy signet*, the particular seals of the several courts, that of the *king's bench* and *common pleas* in custody of the chief justices of either court, or their clerks appointed for that purpose, the seal of the *exchequer* in the custody of the chancellor of the exchequer, the seal of the duchy of *Lancaster* in the custody of the chancellor

cellor of the duchy, the seal of the county palatine of *Lancaster* in the custody of the chancellor of the county palatine, which are sometimes in the same person, the seals of county palatine of *Chester*, of the several justices of assize, *oyer and terminer* and gaol-delivery, the king's seal of statutes and recognizances, the seal of the exchequer; and for the most part these seals are delivered by the king's order signified sometimes by his privy signet, sometimes by his secretaries, but antiently the most of them were delivered by the king in person to the several persons, that had the custody thereof, and a *memorandum* made thereof upon the back of the close roll. *Clasf. 43 E. 3. m. 18. dorſ.*

The antient manner of delivery of the seal for statutes merchant, and probably for other seals of like nature was by the king in person as before, or by a close writ and *memorandum* under the great seal. *T. 19 E. 1.* it is commanded, that for the future it should be delivered under the seal of the chancellor of the *exchequer*.

The manner antiently of delivering the judicial seals of the king's bench and common pleas was by the king or chancellor to the chief justices respectively, and in like manner the judicial seal of the exchequer to the chancellor of the exchequer; these were ordinarily in two pieces, *Clasf. 43 E. 3. m. 18. dorſ.* The profits of the seals belonged to the king, except the seventh penny, which is the fee of either chief justice (*a*); and when the king farmed out the profits of the seal of either court, sometimes one piece remained with [173] the chief justice or his deputy, the other piece remained with the farmer or his deputy: these profits of the seals of the courts of the king's bench and common pleas were let for 1000*l. per annum* (*b*) by

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(*a*) The antient fee to the chief justice was one penny for every writ, as appears from two of the records here quoted by our author, viz. 20 E. 3. Rot. 87, 22 E. 3. Rot. 115. the first of these is a grant to *Walter of Yarmouth* of the profits of the seals for ten years, in consideration that the said *Walter* should pay to the clerk of the hanaper for the king's use 250 marcs every year, and should likewise discharge a debt of the king's of 200*l.* by the yearly payment of 25*s.* the said *Walter* to be allowed every year cent folds for his expences in sealing writs; all writs *ad sciam regis*, &c. to pay no fees, *Et que les justices preignent vn de deniers au brief par leur feale en manere come ad eſte uſe en temps paſſe.*

The latter is a grant of the king (upon his having resumed the seals on account of some misdemeanor committed by *Walter*

of *Yarmouth*) to *John de Padebury* and *Henry de Sulibull*, reddendo inde regi de claro per annum ducentas & quatuor viginti marcas per manus clericorum hanapiorum, writs ad sciam regis, &c. to pay no fees, & quod justitiarii nostri in placitis illis percipient unum denarium de brevi pro sigillis suis, prout ibidem battentes est iustitiam: it should seem therefore, as if the person employed by our author to consult the record mistook the word *vn* in the first grant for a numeral *viii*, and that this was the occasion of his making the seventh penny to be the fee of the chief justice.

(*b*) These profits were not let for above three or four hundred pounds *per annum*, as appears not only from the above-mentioned cases, (the highest of which is 20*s.* and 250 marks *per annum*, which is on more than 366*l. 13s. 4d.*) but also from the

18 E.

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the king. *M. 18 E. 3. Rot. 35. Rex. P. 20 E. 3. Rot. 87. T. 22 E. 3. Rot. 115. M. 23 E. 3. Rot. 31. coram rege (c).*

Many times the justices issued process under their own seals unto [174] the sheriffs: this was complained of *inter petitiones parlamenti 12 E. 3. n. 6.* by the chancellor of the exchequer and clerk of the hanaper, as a derogation to the king's profit, and contrary to the duty of the sheriff, who, by his oath, is bound to receive no writs, but under the king's seal; the answer is, *Soit briefe mand' a justic' de common banc contenant l'effet de petition, & quils pur lour advisement facent tiel remedy en lour place, come ils verront, qe soit a faire a profit du roy.*

And it seems most usual, that since that time judicial process not only in those greater courts, but in most other courts issued under the king's seals thereunto deputed, yet justices of assize and gaol-delivery sometimes make their precepts under their own seals: *vide Judicial Register, 34, 35, 41, 43, 73, 84. vide pur ceo Rot. Parl. 25 E. 3. n. 25.* a petition that judicial process out of the king's bench and com-

18 E. 3. Rot. 35. where the king signifies by writ 20 Octob. to his justices, that he had granted to Matthew Cancœur and his assigna datum proficuum ad se de sigillis omnium breviuum judicialium de banco suo & banco communione exequitorum pertinens, usque ad terminum decim annorum, in valorem tracentarum librarum per annum, de quibus ipsi solvent ad opus regis custodi hanaperi cancellarie quolibet dictorum decem annorum centum libras de exitibus brevium praedictorum, & reservabunt penes se totum proficuum refiduum de brevibus supraadiutis durante dicto termino in recompensationem decim [duo] millium librarum fieri regorum, de quibus praedictus Mattheus in debitis, in quibus rex certis personis in ducatu Aquitanie tenebatur, assumpsi regem acquisitare & exonerare; ita semper quod brevia ad scelam & pro commendo regis per vijsum & testimonium illorum, qui pro regi prosequuntur ac brevia pro hominibus de curia regis, & pauperibus hominibus facta & facienda absque aliquo inde solvendo delibererint, prout bactenus in cancellaria fieri consuevit. Et sciendum quod codem 20 dii Octob. Robertus de Sadyngton Cancellar' domini regis liberavit Willielmo Scot [capitali iustitiario] apud Wilm' quoddam sigillum domini regis pro brevibus praedictis in Banco domini regis sigillandis, cuius unam partem idem Willielmus Scot liberavit eidem Rogero de Merlawe, deponente dicti Matthi Canaceor' jurato, aliam vero partem ejusdem sigilli penes se ipsum retinendo; Et dictum est eidem Rogero, quod oficio praedicto bene & fideliter intendat secundum

dum formam & conditionem in brevi praedicto contentam periculo quod incumbit, &c.

Altho the conderation is here said to be the discharging of a debt of ten thousand pounds, (which probably led our author to think the profits were let at 1000*l. per annum*, so that in ten years time that debt might be discharged) yet the annual produce of the seals being no more than 300*l.* one hundred whereof was to be paid yearly for the king's use, it seems to me pretty plain, that the king's debt, which he undertook to pay, could be only two and not ten thousand pounds; what strengthens this observation is, that the indentures of agreement being in French, it was very easy to mistake *deux* for *diez*.

(e) This was a grant of the seals of the king's bench and common pleas to Anthony Bach to seven years in recompensationem septingentorum marcarum (due to him on an annuity formerly granted) at the rate of 200*l. per annum* for the two first years of the said term, and 200 marks *per annum* for the five remaining years, the said Anthony to pay to the clerk of the hanaper for the king's use one [two] hundred marks *per annum* for the two first years, and one hundred marks *per annum* for the five remaining years; and the king thereupon sends his writ de admittendo praedictum Antonium vel ejus alterum ad officium praedictum modo debito faciendum; and he was admitted accordingly.

mod

mon pleas might issue under the seal of the chief justices, as is used in *eyre, assizes, & oyer & terminer*, but denied.

But to return to the business of the great and privy seal.

The great seal which *Matthew Paris (d) sub anno 1250.* well calls (*clavis regni*) hath been with great care and solemnity kept and used, and therefore antiently, when there was any change made of the great seal, there was not only a *memorandum* made thereof in *dorsum clausorum cancellarie*, and a public notification thereof in the court of chancery, but public proclamation was made thereof. *Claus. 1 E. 8. part 2 m. 11. dorsum.*

Yet in cases of speed and necessity, and sometimes for distinction's sake the king used a private seal for such occasions, which were to be passed under the great seal.

King *John* died, his son king *Henry III.* being but about ten years old, from the beginning of his reign until 3 H. 3. all grants passed under the seal of the earl marshal, that was his protector or guardian, but in the king's name, *viz.* *In cuius rei testimonium has literas nostras sigillo comitis mariscalli rectoris nostri & regni nostri sigillatas, quia nondum sigillum habuimus, vobis mittimus, teste Willielmo comite marisco.* This seal he continued till the third year of his reign, *Claus. 3 H. 3. m. 14. hic incepit sigillum regis currere:* and in the [175] same third year, *viz. Pat. 3 H. 3. m. 6.* there was a provision made in parliament for the discrimination of those charters, that passed during his minority and after his full age, in these words: “*Henricus dei gratia, &c. Sciatis quod provisum est per commune consilium regni nostri, quod nullae cartæ, nullæ literæ patentes de confirmatione, alienatione, venditione vel donatione, seu de aliqua re, que cedere possit in perpetuitatem, sigillentur magno sigillo nostro usque ad ætatem nostram completam, Teste, &c.*” and after the setting down of divers witnesses are these words, “*Provisum est etiam per commune consilium regni nostri & coram omnibus predictis, quod si aliquæ cartæ vel aliquæ literæ patentes factæ secundum aliquam predictarum formarum sigillatae inveniantur predicto sigillo, irritæ habeantur & inane, testibus predictis.*”

It appears *Claus. 20 E. 2. m. 3. dors.* in the beginning of that miserable tragedy, that the 26th of October 20 E. 3. the king flying from his wife and son, who was afterwards king, a great number of lords and others chose *Edward* the king's eldest son to be *custos regni,*

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supposing the king to be out of the kingdom ; at that time the chancellor, together with the great seal were with the king, and the new *custos regni ea, quæ juris fuerunt, sub sigillo suo privato in custodia domini Roberti de Wyvill clericis sui existent*, eo quod aliud sigillum prædicto regimine ad tunc non habuit, exercere incepit, postmodum vero 20 die Novemb. proximè sequenti, captis inimicis prædictis & dicto rege in regnum revertente, upon a messuage sent to the king for the seal the King thereupon sent the great seal to his wife and son, ut non solum ea, quæ pro jure & pace effent facienda, sed etiam quæ gratia forent, fieri facerent ; the seal was brought to them 26 Novemb. and the morrow being the feast of St. Andrew it was opened by the queen and her son, and delivered to the bishop of Norwich : and it is to be observed, that a parliament was summoned between the 26th of October and the 28th of November in the name of the king, but to be held before the queen and the *custos regni in quindena sancti Andreae*, which summons must

[176] needs be under his own private seal ; but the 3d of December the great seal being then in their power it was prorogued unto the morrow of Epiphany : the first summons is recited in the writ of prorogation, but it is not entered of record, for it was a hasty confused business, neither had they the rolls of the chancery in their hands to make any entry of it ; and if they had had them, yet it would have been irregular, and not have amended the matter : all that I shall farther add concerning these two instances is, that neither the seal of William earl Marshal used by Henry III. nor the private seal of prince Edward were great seals within this statute, whereof the counterfeiting might be high treason.

When the king dies, tho the office of keeper of the great seal expires, as well as all commissions to sheriffs and justices, yet the great seal of the last king continues the great seal of England, till another be made and delivered.

King Edward III. began his reign the 25th of January, he made the bishop of Ely his chancellor the 28th of January, it was not possible a new seal could be made in that time, and besides the seal was not altered till the 3d of October eodem anno, as appears by the proclamation thereof, *Claus. 1. E. 3. part 2. m. 11. dorſ.* so that all that while the old seal with the old inscription stood ; the method of which alteration was thus : The king by his proclamation bearing teste 3 Octob. anno 1. directed to all the chief sheriffs of England, signifying, that he had made a new great seal, and that it was to take place from the

the fourth day of that month of *October*, sends them the impression of the new seal in wax, commands them to publish it, and that after the fourth day of *October* they should give faith to it, and receive no writs but under the new seal after that day.

The fourth day of *October* being *Sunday* the bishop of *Ely* chancellor produceth the new seal, declares the king's pleasure, that it should be from thenceforth used; the *Monday* after the old seal is broke *præcipiente rege*, and the pieces delivered to the *Spigurnel* (e).

Again, king *Henry V.* died 30 *Augusti anno sui decimo*, a parliament was summoned by writ bearing *testa* 29 *Septemb.* [177] *anno primo H. 6.* to be held *die lunæ ante festum Martini*, a commission issued to the duke of *Gloucester* bearing *testa* 6 *Novemb.* 1 *H. ad in-chandum parliamentum, &c.* and the bishop of *Durham* chancellor to *Henry V.* delivered up the seal to the king 28 *Septemb.* The new seal with the new inscription was in that parliament ordered to be made, the bishop of *Durham* was made chancellor by commission under the great seal dated 16 *Novemb.* the new seal was not made till some time after, therefore the old seal of *Henry V.* was used in the summons of the parliament and all the transactions till the new seal was delivered: indeed when *Edward IV.* assumed the crown, the seal of *Henry VI.* was not used, for it could not be had, and if it could, yet *Henry VI.* being declared an usurper, there was no reason for *Edward IV.* to give any countenance to that usurpation by using of his seal, who was declared an usurper and attainted of treason.

So that (except the last case of an usurper) till a new great seal be made, the old seal, being delivered to the keeper and used and employed as the great seal, is the great seal of *England* within this statute, notwithstanding the variance in the inscription, *portraiture*, and other substantials from the state of the present governor.

But then, what shall we say of the old seal, when the new seal is made and delivered of record to the keeper, and the old seal broken? To this I say, 1. It was once the great seal of *England*, and therefore the counterfeiting of that seal and applying it to an instrument of that date, wherein the old seal stood, or to an instrument without date, is high treason; nay, if in the time of *Edward IV.* a man should counterfeit the great seal of *Henry VI.* and apply it to a patent or other instrument of his time, it had been high treason, tho

(e) The *Spigurnel* was an officer, whose place was to seal the king's writs. *Camd. Remains*, p. 126.

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Henry VI. were an usurper, and his seal in the time of *Edward IV.* of no value. 9 E. 4 (f).

[178] But what if in the case before instanced in, after the 4th of October 1 E. 3. a man had forged a grant by king *Edward III.* (g), bearing teste 2 E. 3. when the old seal was out of date, or in the time of *Edward IV.* had forged a grant by *Edward IV.* and counterfeited the seal of *Henry VI.* thereunto; this seems not to be a counterfeiting of the great seal of *England*, if the difference appear very legible and conspicuous, for at the time, whereto it relates, there was no such great seal in being; but if the difference between the seals be such as be not evident to the view of every man's eye, it may be more doubtful; *sed vide de hoc infra.*

This statute speaks only of the great seal, and privy seal, and therefore no other seals were within this statute.

But by the statute of 1 Mar. Jeff. 2. cap. 6. "If any do falsely forge or counterfeit the queen's sign manual, privy signet or privy seal, every such offense shall be high treason, and the offenders herein, their counsellors, procurers, aiders and abettors being convicted according to the course of law shall be adjudged traitors against the queen, her heirs and successors." But now what shall be said concerning these other seals above-mentioned, as the seals for the writs of the courts of king's bench, common pleas, and exchequer, the seal for statute-merchant, &c.

By the old law, it seems that counterfeiting any of the king's seals, wherewith writs were sealed, was petit treason, tho' it came under the name of *crimen falsi*. *Glanvil*, that wrote in *Henry II.*'s time, *Lib. XIV. cap. 7.* "Distinguendum est, utrum fuit carta regia an privata, quia si carta regia, tunc is, qui super hoc convincatur (scilicet de falsificatione) condemnandus est tanquam de crimine laesæ maiestatis; si vero fuerit carta privata, tunc cum convicto mitius agendum est, sicut in ceteris minoribus criminibus falsi, in quorum iudiciis consistit eorum condemnatio in membrorum solummodo amissione, pro regia tamen voluntate." *Braffox*, that wrote in the time of *Henry III. Lib. III. cap. 3. de crimine laesæ maiestatis, §. 2.*

[179] "Est & aliud genus criminis laesæ maiestatis, quod inter gra-

" viora numeratur, quia ultimum inducit supplicium & mor-

(f) This is *Bogot's* case, 9 E. 4. 1 b. " compassing his death, &c." where it is said by the council, "That a man shall be arraigned in the time of E. 4. for treason done against H. 6. in

(g) This must be understood under the old seal.

" tis occasionem, scilicet crimen falsi in quâdam fri specie & quod
 " tangit coronam ipsius regis, ut si aliquis accusatus fuerit vel con-
 " victus, quod sigillum domini regis falsaverit consignando inde cartas
 " vel brevia, vel si cartas confecerit & brevia & signa apposuerit adul-
 " terina, quo casu si quis inde inveniatur culpabilis vel sefatus, si war-
 " rantum non habuerit, pro voluntate regis judicium sustinebit, &c, si
 " warrantum habuerit & warrantizaverit, liberabitur & tenebitur war-
 " rantus." *Fleta*, that wrote in the time of E. 1. Lib. I. cap. 22. de
crimine falsi, tells us, " Crimen falsi dicitur, cum quis accusatus fuerit,
 " quod sigillum regis, vell appellatus, quod sigillum domini sui, de
 " cuius familiâ fuerit, falsaverit & brevia inde consignaverit, vel
 " cartam aliquam vel literam ad exhaerationem domini vel alterius
 " damnum sic sagillaverit, in quibus casibus si quis inde convictus fu-
 " erit, detractari meruit & suspendi. §. 3. Item crimen falsi dicitur,
 " cum quis illicitus, cui non fuerit ad hoc data authoritas, de sigillo
 " regis rapto vel invento brevia cartasve consignaverit:" *Britton*, that
 wrote in the time also of E. 1. cap. 4. " Soit inquise de tous ceux,
 " qui aucun fausin averont fait a nostre seale, come de ceux qui per
 " engin ont nostre seale pendu a aucun charter fauns conge, ou que
 " nostre seale ount emble ou robbe, ou autrement troue eient ensele
 " brefs fauns autre auctorite, and cap. 8. Graund treason est a fauler
 " nostre seal, &c."

Upon these old books there is no difference made touching the king's seals, but generally the crime of treason was supposed in counterfeiting any of them, but most certainly the statute of 25 E. 3. extends only to the great and privy seal, as to the point of treason; but then whether that, which was a treason before, remain not still a felony at the common law (for all treasons include felony. 3 H. 7. 10. Co. P. C. p. 15.) is considerable.

M. 2 H. 4. B. R. Rot. 2. as I take it, *Visum est curia*, quod *contrafactio* *sigilli regis pro recognitionibus non est nisi feloniam* (h): but tho they held it not treason, they do not positively affirm it [180] felony since the statute of 25 E. 3. but only *non est nisi feloniam*, viz. that at most it can be only felony.

P. 6 E. 2. B. Rot. 2. Essex. *Johannes de Bosco per cur' est culpabilis pro falsitate, eo, quod cepit cultellum suum & calefaciebat eum apud*

(h) There is no such entry to be found either on the second or seventh roll of the pleas or crown-roll of that term, but the words cited by our author are in the abstract of the rolls of the king's bench of Mich. 2 H. 4. Rot. 7. but upon what authority is uncertain, being in a different and more modern hand than that of Mr. Agard, who in the reign of James I. abbreviated the king's bench rolls.

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ignem & operuit breve regis & imposuit aliud fictum, dicit quod est clericus, & traditur ordinario Westm' (i). Simile P. 18 E. 2. B. R. Rot. 25 Rex (k).

[181] It appears not, whether it were a writ under the great seal or a judicial writ of some court, but whether it were the one or the other, it seems to be capital, for he had the benefit of clergy, which in those times was allowable in some cases of treason; so that it seems a counterfeiting of any of the king's seals was felony at common law, but whether it so continues, notwithstanding the statute of 25 E. 3. hath degraded it from treason, unless it be the great or privy seal, shall be farther examined.

II. Having thus considered the seals, it remains to consider what shall be said *a counterfeiting* of the great or privy seal.

A conspiracy or compassing to counterfeit the great or privy seal is not a counterfeiting nor treason within this act, for it must be an actual counterfeiting. *Co. P. C. p. 15.*

(i) The record of this case is thus, "John de Bosco was arraigned pro falsitate & ligilli & brevi domini regis, eo quod levit cum brevi [de cancellaria] ad ignem & calefaciebat cultellum, & cum illo cultello ceram dictæ brevia finibat, and amoto illo brevi imposuit aliud breve [this was a Superfedeas to the sheriff of Essex] & illud in eadem cera inclinat & tradidit servienti suo illud breve vicecomiti Essex deferendum, qui quidem serviens in praesentia predicti Johannis de Bosco liberavit eidem vicecomiti falso breve predictum: Dicit quod clericus est;" upon which he was claimed by the abbot of Westminster his ordinary; "Sed ut sciatur pro quali eidem ordinario liberari debeat," a jury *ex officio* pass upon him, who find him guilty "de praediaria falsitate, finiendo cum cultello suo predicto ceram predictam & imponendo falso breve predictum, sicut ei superius imponitur: Ideo inde ad judicium, &c. & interim committitur a maresch, &c." There is no judgment entered upon the roll; so that from this record, which is not in usual form, it is doubtful whether he had his clergy or not, tho from a jury passing upon him *ex officio* it is most probable he had; but yet it should seem from the case of *Geoffrey de Huntingdon & Richard de Clinton*, which was but six years afterwards, as if this offense was not so much as felony; they were charged "pro contrafactione sigilli regis & carte sub sigillo regis sic contrafactio," which was found in their custody; afterwards they plead the king's pardon "pro omnibus felonias & transgressionibus,

"qui inspecta carta predicta, quam dicitur esse contrafacta, compertum est quod carta non est de forma in cancellaria regis utilita, inspecta etiam cera ejusdem carta suspicere compertum est, quod cera illa impresa est sigillo regis cancellar", sed prius apposta fuit cuidam alteri litera regis patenti, quod citius dici potest transgressio, quam contrafactio. Et dominus rex perdonavit eis factam pacis sue, quae ad ipsum pertinet, de omnimodiis felonii & transgressionibus, &c.—jam per tres annos in prisone regis steterint occasione predicta & non alia causa, dictum est—quod deliveret eos, &c. & ipsi cant inde quieti, &c. Et carta illa cancellatur in cur." *Mich. II E. 2. B. R. Rot. 156.* Heref. from hence it appears that the judgment afterwards in *Leake's* case 4. *Jac. 1.* was agreeable to the ancient resolutions.

(k) This is the case of *Philip Burden*, but is by no means similar to that of *John de Bosco*, for this was a direct actual counterfeiting of the great seal: *wide infra in notis*. See also another case to this purpose for counterfeiting the privy seal. *Rot. part. 6 E. 2. part. 2. m. 18.* "John de Ryng" was arraigned and tried coram tenetalle & marescallio holpitii domini regis pro contrafactione privati sigilli domini regis, & pro quibusdam litteris predicto sigillo contrafactis [contrafacto] consignatis cum eo inventis, and being found guilty had judgment, "Quod pro predicta seductione [seditione] sit detracitus, & pro manuopere cum sigillo predicto postea suspenso." *Vide Ryng's Placita Parlamentaria, p. 542—545.*

A taking

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A taking the great seal off from a true patent and clapping it on a forged patent in former times hath been held high treason; in 40 *Aff.* 33. it is plainly held to be high treason, (tho' my lord *Coke* (*l*) saith otherwise) for the woman, that did it, could not be let to mainprise, which if it had been only a great misprision, she had been bailable upon that indictment (*m*).

2 *H.* 25. which is entered *H.* 2. *H* 4. *B.* *R.* *Rot.* 16. *Midd. Clement Petitione*'s case, the taking off the true seal from one patent and fixing it to a forged patent is adjudged high treason; yet the judgment is only *quod distrahatur & suspendatur*, which is the judgment in petit treason.

This case and the reporting of it is disliked by my lord *Coke P. C.* p. 15. (*n*); but *Saintf. Pl. C.* p. 3. seems to agree with this resolution.

But the later authorities are against it, and that it is only a [182] great misprision and offense, but not high treason, no nor yet felony, as it seems by the book hereafter cited.

37 *H.* 8. *B.* *Treason* 3. A chaplain taking a good seal off from an old patent, and fixing it to a forged dispensation of non-residence no treason, but only a great misprision punishable by fine and imprisonment.

(*l*) *Co. P. C.* p. 115.

(*m*) This argument of our author is very far from being conclusive, for by the statute of *Westm.* 1. cap. 15. where the offense is *opus et manifestum* (which for what appears was the case here) the offender is not bailable, altho' it were only a misprision. 2 *Co. Inf.* 183, 189.

(*n*) And well it might be, for that case appears by the record to have been thus: *Clement Petyn* was indicted, quod contrafecit magnum sigillum domini regis falso & malitiolis & proditione, & cum dicto sigillo sic contrafacto quasdam literas, quas praesent' predicti sunt confit', sigilli: he pleads not guilty, the jury find, quod quoad contrafactionem sigilli predicti idem *Clement* in nullo est culpabilis, sed dicunt, quod idem *Clement* mens falso & deceptorio & in deceptionem populi de assensu aliorum de cōvina sua scribi fecit, & fixxit literas illas pendī fecit sigillum, magnum domini regis, quod ante penderbat super aliam magnam patentam domini regis, & sigillum domini regis predictum subtiliter & private confui fecit super literas falsas predictas, & illas falsas literas una cum sigillo domini regis predicto in diversis partibus regni Angliae tanquam veras li-

"teras patentes, prout eisdem literis faciunt mentionem, usus est & exercetebat"
"in deceptionem domini regis & populi
"sui; propter quod pro eo, quod curia
"non avisa*uit*, quale judicium predictus
"*Clement* in hac parte subire debeat, remittitur prisone maresch': Afterwards in the *Easter* term next following, vide indicamento necnon veredicto predictis videtur curia hic, quod falsae literas predictas sic in deceptionem dominum regis & populi sui factae & signatae, una cum ufo & exercitio earundem, alta proditione sunt, consideratum est, quod predictus *Clement Petyn* distrahatur & suspendatur." This must be owned to be a very extraordinary case, for as lord *Coke* justly observes, whatever offense this were, yet this judgment ought not to have been given upon this verdict, for the jury had expressly acquitted him of the offense charged in the indictment; not to mention, that it is directly contrary to the case above-mentioned of *Geoffrey de Huntyston*; there is likewise another irregularity in this case, that tho' the offense was committed after the 25 *E.* 3. and is laid to be done *proditione*, yet it is not laid to be *contra formam statuti*, as since that statute all treasons ought to be.

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H. 4 Jac. cited by lord *Coke*, *P. C.* p. 16. *Leake's case*, who joined two parchments together with gley so close, that it could not be discerned, and put a label through both, and on the one a true patent granted, which passed the seal, and then afterwards upon the other parchment wrote a forged patent, then he cut off the true patent and published the other as a true patent; this was ruled by the advice of all the judges, 1. That this was no counterfeiting of the great seal, nor treason within this act. 2. But if it had been a counterfeiting of the seal, he might have been generally indicted of treason for counterfeiting the great seal, but it was ruled to be a great misprision or offense, but not high treason; and with this opinion agrees my lord *Coke*, and it is the safer and later opinion and fit to be followed.

If the patentee of the king, of lands under the great seal, raze the name of one of the manors and make it another name, this is not [183] counterfeiting of the seal nor treason within this statute, but a great offense or misprision, for which the abbot of *Bruer* was sentenced before the king and his council, and the abbot delivered up the charter to be cancelled. *Claws. 42 E. 3. m. 8. dorf. Co. P. C.* p. 16.

If the chancellor or keeper affix the great seal to a charter without warrant, tho this be a misdemeanor in him, it is not treason within this statute, tho *Britton* and *Fleta ubi supra* make it treason at common law; and altho it should be supposed treason at common law, but not comprised within the statute, yet it is not now felony; therefore the rule taken 3 *H. 7. 10.* that those treasons at common law, which are not within the declaration of 25 *E. 3.* yet remain felony, is not true, as might be made appear by many instances.

And upon the same account it seems, that altho, by *Fletq* and *Britton*, if a man find casually the great seal, and seal a forged charter, this was treason at common law; yet it is neither felony nor treason at this day, for here is no counterfeiting of the great seal, it is therefore only a great misdemeanor, *Co. P. C.* p. 16.

And altho it seems, by the old books above cited, that counterfeiting of the judicial seal of the king used for writs was then treason, yet very lately in the king's bench it was ruled to be no felony at this day, but only a great misdemeanor punishable by fine and imprisonment, or by standing in the pillory, or both, so that the book of 3 *H. 7.* is not in all points agreeable to law, for many things were treason before 25 *E. 3.* which are thereby declared not to be treason, and yet remain

nor

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not felony at this day ; and the like for counterfeiting the seal of a statute merchant.

If a man grave the sculpture of the great seal without warrant from the king, but never use it or apply it to seal any thing, this seems to be no counterfeiting of the great seal, tho it be with design and preparatory to such an attempt ; for tho in truth the instrument itself be the seal, as appears by the usual expression *figillo meo figillat*, and by the frequent proclamations *de figillo amissis*, when either the king or a subject lost his seal casually, yet it seems not a seal within this statute till an impression made in wax in testimony of some writing, [184] no more than the forging of a stamp for money is a counterfeiting of money, unless it be used, tho in both cases it is a great misdemeanor and a great evidence to prove the offense committed, if any other circumstances concur to prove it done.

M. 16 Jac. B. R. One counterfeited the draught of a patent to himself and others to compound with alehouse-keepers and usurers touching their offenses, and counterfeited the privy signet to warrant the passing of the other commission so by him drawn, and collected divers sums of money thereby, and for counterfeiting the privy signet he was indicted of high treason upon the statute of 1 Mar. It was resolved, 1. That the counterfeiting of the great seal, privy seal, sign manual, or privy signet is at this day high treason. 2. That the adding of the crown in the counterfeit signet, which was not in the true, and the omission of some words in the inscription, which were in the true signet, and the inserting other words, which were not in the true, (which was done purposely, that there might be a difference between the true signet and the counterfeit) alters not the case, but it is high treason, for the fixing of the counterfeit signet, and thereby obtaining the great seal to his feigned patent, and thereby publishing it to be true, and collecting sums of money by it make it treason ; the offender had judgment to be drawn, hanged and quartered (a).

So that it should seem, that tho there might be so great a disparity between the true and counterfeit signet, that the bare affixing of such a seal might not be a counterfeiting within the statute ; yet if it were so like, that it deceived the officers of the great seal, and was used to that purpose, and attained its effect, viz. the affixing of the great seal to the forged commission, it was a sufficient counterfeiting to bring him within this law of 1 Mar.

(a) This case is reported in a Rel. Rep. go. by the name of Robins's case.

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The like *mutatis mutandis* may be applied to the great or privy seal.

[185] If a man counterfeit the stamp of the great seal, and deliver it to *B.* to use, *B.* being ignorant that it is a counterfeit stamp, but thinking it true, seals a writ or commission, this seems not to be treason in *B.* because he did it not *proditoriè*, but it seems to be treason in the deliverer, if he delivered it to that purpose, for he did it *proditoriè*, but the other not.

III. I come in the last place to consider the judgment in the case of counterfeiting of the seal, whether it be only to be drawn and hanged, as in the case of counterfeiting money, or to be drawn, hanged, beheaded, &c. as in the case of compassing the king's death, levying of war, or adhering to the king's enemies.

It seems that at the common law this offense was felony or treason at the king's election; if the indictment ran only *felonie* it was only felony; if *proditoriè* it was treason (*p.*).

But altho it were *proditoriè* and so applied to treason, it was not a treason of so deep a die, as that of compassing the king's death, adhering to the king's enemies, or levying war, which strikes at the head, and therefore in comparison thereof it was a kind of petit treason.

Clauſ. 6 Joha. M. 12. dorf. " *Scias quòd dedimus Adæ de Effex*
" *clericō nostro pro servitio suo omnia terras, tenementa & jura, quæ*
" *fuerunt Willielmi de Strubby, cuius terræ & tenementa sunt ef-*
" *chaeta nostra per feloniam, quam fecit de falsificatione sigilli*
" *nostri.*" *Et nota* the king had the escheat, yet the offense was styled felony.

At the parliament 18 E. 1. C. P. C. p. 16. Clergy was allowed to a man convict *pro falsificatione sigilli regis*; *deliberatur ordinario* (*q.*) [186] but in *tali casu non admittenda est purgatio*; and yet in these greater cases of treason of levying war or compassing the king's death clergy was not allowed at common law. *F. 21 E. 3. B. R. Rote 23. Rex* (*r.*).

M. 1

(*p.*) *C. P. C. p. 15.*

(*q.*) This is confirmed by Philip Burton's case, (*P. 18 E. 2. B. R. Rot. 25. Rex Scob'.*) who together with Richard de Bourne was indicted *Quod nequiter & sedi- cione contrafecit sigillum de metallo ad modum magazii sigilli regis, de quo quidam sigillo con- trafacto diciria brevia quamplurima configua- vi;* he pleaded *quod clericus f.*, the jury found him guilty *de felonie & seditione praeditissi ei- tempatis*, and he was thereupon delivered

to his ordinary, *tangam clericus convictus*, from hence it appears that at common law clergy was allowed in cases of treason, where it was not immediately against the king's person.

(*r.*) That case was thus, *Peter de Thorpe* son of *John de Thorpe* was indicted, and afterwards outlawed anno 18 E. 3. *pro diversis felonis & seditionibus, viz. going to little Yarmouth and Gorleston cum tribu: vexillis ex- tentis in modum guerra, breaking open barchies*

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M. i E. 3. Charter de Pardon 13 (f). A man arraigned for counterfeiting the king's seal pleaded a charter of pardon of all felonies, and it was allowed ; yet there it is agreed, that the judgment for such an offence is, that he shall be drawn and hanged, but such a pardon will not serve in such a case since the statute of 25 E. 3.

Trin. 10 E. 2 Rot. 132. B. R. Bucks. " *Robertus Legat & Jo-*
" hannes Salecok per ballivos coram rege ducti ad respondentum do-
" mino regi de hoc, quod ipsi cum aliis ignotis in pleno mercato villæ
" de Olneye, cum quadam falsa commissione & ficta cum quadam
" sigillo regis controfacto signata, quam ballivi in curia regis hic por-
" rexerunt, afferentes, illam super eos inveniri die, quo attachati fu-
" erunt, & dicentes, quod virtute illius commissionis prisas fecerunt
" ad opus domini regis, usque ad summam sexaginta bestiarum, de
" quibus quatuor bestiæ inventæ fuerunt in eorum possessione & cum
" eis hic ductæ ; they both plead not guilty ; the jury find John Sale-
" cok guilty de falsitatibus & felonias prædictis, judgment given against
" him pro falsitate sigilli regis & commissione prædictis quod detra-
" hatur & pro furtiva abduclione prædictarum bestiarum suspendatur."

Nota, an arraignment of treason without indictment upon the mainouer (*t*) found upon them : *vide P. 21 E. 3. B. R.* [187].
Rot. 46. Midd' Rex.

According to the old books above-mentioned, *Fleta*, &c. *ubi supra*, *distrahi debet & suspendi* ; and so it was practised in the case of 2 H. 4. above-mentioned, where the judgment is only *distrahi & suspendi*.

And it may be reasonably argued, that as in the case of counterfeiting the king's coin, which was a treason at common law, tho' it be so declared by the statute of 25 E. 3. yet the judgment, that was at common law, which was only to be drawn and hanged, is not altered by that statute. *M. 10 Car. B. R. Morgan's case (u)* : so in case of counterfeiting the seal ; but at this day the law is generally held, that

houses there, feloniously taking away goods there, &c. and also five ships, &c. *Quæ præparatae erant de virtualibus & aliis necessariis eundi cum domino rege in guerra sua, &c.* Afterwards coram rege quæstum est a præfato Petro, si quid pro te habeat vel dicere sciat, quare ad executionem judicij de eo super utlagaria prædicta procedi non debeat, &c. *Qui dicit, quod clericus est & membrum sacre ecclie, &c.* Et quæstum est superius ab eo, si quid aliud velit dicere pro responsione in retardationem judicij, &c. *Qui dicit, ut prius, & nihil aliud re-*

spondet, &c. Et inspeccis indictamentis prædictis, & etiam recordo & processu utlagar' prædicta manifeste compertum est in eisdem, quod utlagar' prædicta super articulo sediunis promulgatur, in quo casu prædictus Petrus privilegio clericali gaudere non potest secundum legem & consuetudinem regni, &c. Ideo idem Petrus distrahatur & suspendatur, &c." (f) 1 E. 3. 23. b.

(f) See for this kind of arraignment, 7 H. 4. 43. b. S. P. C. 148. c. a. Co. Infus. 188.

(u) Cro. Car. 383.

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for counterfeiting of the great or privy seal, or of the privy signet or sign manual, the judgment is to be hanged, beheaded and quartered, as in other high treasons, and so was the judgment in the case of 16 Jac. above-mentioned; and it is safest to follow the modern practice in judgments of high treason, tho I think it no error, if the judgment be only *quod disfracatur & suspendatur*, according to the antient precedents, because the judgment is still capital, and tho it be less than the highest judgment in treason, yet it is still included in it.

1 Hawk. P. C. 41. 4 Black. Com. c. vi. p. 83. Kelyng 8o. Coke's Entries, 360. b.
See a precedent there.

[188]

CHAP. XVII.

Concerning high treason in counterfeiting the king's coin, and in the first place touching the history of the coin and coinage of England.

THE legitimation of money and the giving it its denominated value is justly reckoned *inter jura majestatis*, and in *England* it is one special part of the king's prerogative.

Before I enter into the particulars concerning money I will give a history or narrative of the various states and conditions and changes of money in the several ages of this kingdom, and then shall descend to some more particular observations, which will be useful in this business.

Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The material, whereof it is made. 2. The denomination or extrinsic value. 3. The impression or stamp.

1. The material in *England* is either pure silver, or pure gold, whereof possibly some money was antiently made here in *England*, or else silver or gold mixed with an alloy, which was usually and is hitherto a small proportion of copper.

The standard of the money of *England*, that hath for many ages obtained, is that, which is commonly called *Sterling* (*a*) gold or *Ster-*

(a) Some imagine this word to come from the town of *Sterling* in *Scandinavia*, where they pretend the purest money was formerly made; others that it is derived from the same word *Stora*, which signifies rule or standard; others that it was taken from

some *French* workmen, who in the reign of King *John* were invited over to reduce the money to its proper fineness; the people of that country being generally called *Anglo-Francs*.

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King silver, for tho the denomination of *Sterling* was at first applied to the coin of silver and to that coin, which was the penny commonly called *Sterlingus*, yet use hath made it applicable not only to all kind of *English* coin of silver, but also to coin of gold, and this is called the standard of coin.

But before this can be well understood, we must make some digression touching the measures applicable to these materials.

In silver the measure or weights applicable thereunto are principally these:

1. The pound, which being not *avendupois*, but *troy* weight consists of twelve ounces.
2. The ounce consisting of twenty penny weight.
3. The penny or *Sterling* consisting of thirty-two grains of wheat taken out of the middle of the ear.

This is the old *compositio monfurorum* settled in the time of E. 1. (b) viz. quod denarius Anglie, qui denominatur Sterlingus rotundus, sine tonsura ponderabit triginta duo grana frumenti medio spica, & viginti denarii faciunt unciam, & duodecim uncias faciunt libram, & octo libras faciunt gallonem, & octo gallones bushelum (c).

And it is to be remembered, that at that time a penny did really weigh the twentieth part of an ounce of silver, and twenty pennies did really weigh an ounce of silver, and two hundred and forty pence did really amount to a pound weight troy, and to twenty shillings, which made a pound of silver coin.

And altho at this time the coin is raised, and therefore varies from what it was at that time, yet to this day twenty shillings in silver is called a pound, and the measure of an ounce is by twenty penny weights according to the old proportion; but indeed the grain is changed (*), for whereas thirty [two] grains of corn then made an ounce [a penny weight], yet because the weight of corn is not always uniform, and the number of thirty [two] was not so ready and easy for computation; the penny weight is now divided into twenty-four equal parts, which are commonly in the business of the mint called grains.

(b) An old leiger book of the abbey of St. Edmundsbury lays the affair was thus settled in 3 E. 1. by George Rockley then mayor of London and master of the mint; and in the 28 E. 1. an indented trial-piece of the goodnes of old Sterling was lodged in the exchequer, and every pound weight troy of such silver was to be thrown at twe-

ty shillings and three pence. See Tindal's note on Kopin's history sub fine Ed. 1.

(c) Vide Statute 31 E. 1. 2 Co. Inst. 577.

(*) There being, as I apprehend, two or three mistakes in this paragraph, I was not willing to vary from the original MS. but have inserted in brackets what I think was intended.

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But touching the measure of gold, there is some difference in relation to coin from that of silver, for we are told by the *liber ruber scaccarii* in that large tract concerning money, that the pound of gold consists of twenty-four carets, every caret weighing half an ounce of silver, and every caret consisting of four grains; and consequently every grain of gold would weigh sixty of those grains, which we call grains of silver, *viz.* the artificial grains, whereof twenty-four make the penny weight (*d*).

Now the *Sterling* standard was antiquely, as it seems, somewhat different from the standard as it is at this day, and for some hundred of years before; for from the 46th year of *Edward III.* and for some time before until this day the standard of *Sterling* silver hath been and is this, *viz.* every pound of *Sterling* silver hath eleven ounces two-penny weight of fine silver, and eighteen penny weight of copper, which makes the alloy of *Sterling*; but because there cannot be so exact an observation of the proportion, a half-penny weight of copper over or under is allowed for the remedy, which is the cause that *Sir John Davis* in the case of mixt monies, fol. 24. b. saith, that eighteen shillings and five pence halfpenny *argenti purissimi continentur in qualibet librâ*, & *qualibet libra de Sterling money avoit 18 d. ob. de alloy de coper, & nient plus.*

But before that time it appears by the red book in the exchequer, (which was written before 46 E. 3. and after 23 E. 3.) the standard of *Sterling* silver consisted of eleven ounces four penny weight of fine silver, and sixteen penny weight of copper, so that then the standard was purer; and possibly by what follows it may appear, that in the time of *Henry II.* the standard was purer than that, for then there was allowed only twelve-pence upon the pound of silver *dealbare firmam* (*e*), which possibly might be to reduce it to fine silver, but this is obscure; *de hoc postea.*

[191] The standard of *Sterling* gold in the latter end of E. 3. (*f*) was, that a pound of *Sterling* gold consisted of twenty-threes carets, three grains and a half of pure gold, and a half grain of alloy of copper, and thus I think it continues to this day; and by this we may understand the statute of 17 E. 4. cap. 1. and 4 H. 7. cap. 2. by the former it is provided, that no goldsmith sell any gold under the

(d) If 1 caret=4 grains=½ ounce=10.
penny weight, then ½ caret=1 grain=2½
penny weight=60 grains of silver. (e) Mat. Paris 747.
(f) See Tindall's note on *Rapin's history*
sub fine Ed. 3.

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fineness of eighteen carats, nor silver under the alloy of *Sterling*; by the latter, that all silver, that shall be fined or parted, be made so fine, that it may bear twelve penny weight of alloy in a pound weight, and yet be so good or better than *Sterling*.

And this is the dignity of the coin of *England*, that it hath been generally of the alloy of *Sterling*, (except some small interruptions, whereof hereafter) and according to this it was enacted 25 E. 3. cap. 13. that the money of gold or silver, which now runneth, shall not be impaired in weight or alloy, but as soon as a good way may be found, the same be put into the antient state, as in the *Sterling* made upon the petition of the commons, *Rat. Par.* 25 E. 3. n. 32.

II. As to the second essential of coin it is the denominated or extrinsic value, which is and of right ought to be given by the king, as his unquestionable prerogative (*g*), and that is seen in these particulars.

1. In the first institution of any coin within this kingdom he, and he alone sets the weight, the alloy, the denominated value of all coin; this is done commonly by indenture between the king and the master of the mint; *de quo postea*.

And tho by special charter or usage divers prelates and monasteries in *England* had a certain number of stamps for the coinage of money, as the abbot of St. *Edmundsbury*, *Clauſ. 32 H. 3. m. 15. dars.* the archbishop of *York*, *Clauſ. 5. E. 3. part. 1. m. 19.* and likewise the archbishop of *Canterbury*, the bishop of *Durham*, the bishop of *Chicheſter*, &c. *de quibus vide. statute 14 & 15 H. 8. cap. 12.* yet they had only the profit of the coinage, and the residence of some coiners at their cities, but they had not the power of instituting either the alloy, the denomination, or the stamp; the stamps were usually [192] sent them by the treafurer and barons of the exchequer by the king's command under his great seal, and the masters or chief officers employed therein were sworn to the king for the just execution of their places. *Clauſ. 5 E. 3. part. 1. m. 10. & 19.*

But those mints have been long disused, tho it should seem by the statute of 14 H. 8. cap. 12. above-mentioned, that the several statutes made against exchange of money, other than at the king's exchanges, were not intended to prejudice these particular franchises of coinage.

2. He may by his proclamation legitimate foreign coin, and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting of such money was not

(g) *Pl. Com. 316.*

treason, till the statute of 1 Mar. cap. 6. made it so, nor the clipping, washing, impairing thereof was not treason till 5 Eliz. cap. 11. and 18 Eliz. cap. 1. but all these statutes allow the power of legitimation thereof to the king by proclamation (*b*).

3. He may inhanie the external denomination of any coin already established by his proclamation, and thus it hath been gradually done almost in all ages, as will appear by what follows in this chapter; this is sometimes called imbasing of coin and sometimes inbansing it; and it is both, it is an inbansing of coin in respect of the intrinsic value or denomination, but an imbasing in regard of the extrinsic value; as for instance, when in the time of E. 4. a noble was raised to a higher rate by twenty pence; *vide* 9 E. 4. 49.

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before, namely to mix the species of money with an alloy below the standard of Sterling; this is the case of mixt monies in Sir John Davis's reports, where the case was this.

[193] April, 43 Eliz. Brett bought wares of one Gilbert a merchant in London, and became bound to him in 200*l.* conditioned for the payment of one hundred pound Sterling current and lawful money of England in September following at Dublin in Ireland: 24 May, 43 Eliz. the queen sent into Ireland certain mixt money from the tower of London with the usual stamp and inscription, and declared by her proclamation, that it should be lawful and current money of Ireland, *viz.* a shilling for a shilling, and six-pence for six-pence, and that accordingly it should pass in payment, and none to refuse, and declared that from the 10th of July next all other money should be decried and esteemed only as bullion and not current money. Upon the day of payment Brett tendered the 100*l.* in this mixt money, and resolved upon great consideration, that this tender was good, the place of payment being in Ireland, and the day of payment happening after the proclamation made; that altho this were not in truth Sterling, but of a baser alloy, nor a money current in England by the proclamation, yet the payment being to be made in Ireland, it was, as to that purpose, current money of England; but if the day had been passed be-

(*b*) See also 8 & 9 W. 3 cap. 25. and 7 Ann. cap. 25. whereby it is high treason knowingly to make, mend, buy, sell, or have in possession any mould or press for coining, or to convey such instruments out

of the king's mint, or mark on the edges any coin current, or to counterfeit, or colour or gild any coin resembling the current coin of the kingdom. And see 15 Geo. 2. ch. 28.

fore the proclamation, then he must have answered the value, as it was when payment was to have been made. Sir John Davis's reports, *case de mixt-moneys* (i).

It is true, that the imbasing of money in point of alloy hath not been very usually practised in *England*, and it would be a dishonour to the nation, if it should, neither is it safe to be attempted without parliamentary advice; but surely if we respect the right of the thing, it is within the king's power to do it; for tho the statute of 25 E. 3, cap. 13. above-mentioned be against it, yet the statute doth not absolutely forbid it; and altho by *Poyning's law* 10 H. 7. all the precedent statutes in *England* are of force in *Ireland*, yet that resolution was given as above.

My lord Coke in his comment of *Articuli super cartas*, cap. 20. seems to imply, that the alteration of money in weight or alloy may not be, without act of parliament, and for that purpose cites [194] the Mirror of Justices (k), *Ordein fait, qe nul roay de ce realme* [194] *ne poit changer sa money ne impaire, ne amender, ne autre money faire,* *qe de ore ou de argenti sans assent de tous ses countees;* and the act of 25 E. 3. cap. 13. the statute of 9 H. 5. Jeff. 2. cap. 6. that all money of gold and silver shall be as good weight and alloy as is now made at the Tower: the parliament-roll of 17 E. 3. n. 15. (l) which was an accord in parliament for the present amendment and increase of coin *de fayre une money des bones Esterlinges en Engleterre du pays & alloy del auctient Esterlinges, qe avera son course in Engleterre enter les graunts et commons de la terre,* which should not be exported; and if those of Flanders would make money of as good an alloy as Esterlinges, that it should be current between merchant and merchant here and others that would receive it, which was a temporary provision for the increase of money.

All that a man can conclude upon these is, that it is neither safe nor honourable for the king to imbase his coin below Sterling: if it be at any time done, it is fit to be done by assent of parliament, but certainly all that it concludes is, that *fieri non debuit, but factum valet*, and this appears,

1. By that resolution in the case of mixt monies, which, tho it were but by way of advice and in *Ireland*, is of great weight, especially if we consider the consonancy thereof to the practice in *Ireland*,

(i) *Dock. Ap. 18.*
(k) *cap. 1. § 3.*

(l) See *C. P. C. p. 93.*

which

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which tho it hath the same law of 25 E. 3. in force there, yet generally their coin current there was of a baser alloy than Sterling, even before the proclamation of 43 Eliz.

2. By the usual inhaising of the coin in point of value and denomination here, which tho it be not absolutely an imbalement of the coin in the species, yet it hath very near the same effect.

3. By the attempts that have been made to restrain the change of coin without consent of parliament. Among those many provisions by the lords ordeiners, 5 E. 2. n. 30. that much abridged the king's power, this was one, *par ceo qe a tous les feys qe le change de mony se fait en royalme, tout le people est grandement grievez ix moins des manners, nous ordeinams, qe quant mestier serra le raye poile exchange faire, qil la face par common councell de son barenage & ego en parlement.*

But these ordinances, and this among the rest was repealed in parliament E. 2. and never revived again.

Rot. Par. 20 E. 3. n. 17.. " Item qe les recevers des payments " nostre seigneur le roy receuent de people en chescun place auxi bien " or come argent al prisé assise desicom le people est arte de cel re- " ceiver pur payment, & qe la change de mony de or ne dargent ne " se face sans assen de parlement.. Ro'. Quant aprimer point de c'ar- " ticle soyt tenus; quant a les changes fair, soit l'article monstre a nostre " seigneur le roy, & as graunts qe sont perdervers lui, qils ent or- " deignent & dient lour volunte."

King *Henry VIII.* imbaled the coin of this kingdom in point of alloy, and so it continued during the residue of his reign, and during the reigns of *Edward VI.* and queen *Mary*, in so much that the penny had not above a half-penny of intrinsic value; but queen *Elizabeth* among the rest of her excellent methods of government did by little and little rectify this detestable imbasement of coin, 1. By prohibiting exportation, and melting down of good silver. 2. By reducing the brass money to its intrinsic value. 3. By making a good allowance (to her own loss) of the base money brought into the mint. 4. By stamping of new money of just alloy of Sterling: *Capnd. Eliz. sub anno 1560. p. 48.*

While I wrote this a proclamation hath issued dated 16 Aug. 1672. whereby copper coin of half-pence and farthings near the intrinsic value is proclaimed in these words: " We do by this our royal proclamation declare, publish and authorize the said half-pence and farthings of copper so coined, and to be coined, to be current money, " and

" and that the same from and after the 16th of Aug. shall pass and be received in all payments, bargains and exchanges to be made between our subjects, which shall be under the value of six-pence, and not otherwise nor in any other manner ;" how far this makes it current money, *videbimus infra.*

And thus far touching the power of denomination, or setting the extrinsic value upon coin ; the manner how this is [196] done will be shewn hereafter.

III. The third essential in coin is the stamp or impression, for tho it may be possible, as Mr. Stowe says, that in antient time money passed in *England* without a stamp or impression, yet I never read any such thing since the conquest, for that, which is frequently called blank money, was not money without impression, bpt white money or pure silver, or at least *Sterling* silver coined, for otherwise it had not been an apt measure for commerce : the stamps or impressions of current money were heretofore delivered to the master of the mint from the exchequer, but of later times they are delivered by the secretary sometimes with, sometimes without the indenture of coinage : now touching the manner of the legitimation of coin in *England*, it is sometimes by proclamation, but always by indenture between the king and the master of the mint.

And therefore where Sir John Davis in the case *ubi supra (m)* makes those six things as essentials to the legitimation of coin, 1. Weight. 2. Fineness. 3. Impression. 4. Denomination. 5. Authority of the prince. 6. Proclamation. The last is not always necessary to the legitimation of coin, for there is scarce any king's reign, but that there are various stamps or impressions of money, which were never proclaimed, and therefore if upon an indictment of clipping or counterfeiting the king's coin it be questioned, whether it be the king's coin or no upon the evidence, there is not a necessity of proof thereof by a proclamation, but it is a meer question of fact, which must be left upon the jury by circumstances of fact to find, whether it be the king's money ; for tho there might be possibly proclamation of some new coins in the beginning of king's reigns, yet it would be impossible to prove them in the antient coins of Edward VI. queen Mary, queen Elizabeth, &c. but if necessary to be supposed, they may be presumed, *ex diuturnitate temporis* ; the most therefore that can be expected is to produce the officers of the mint or their indenture to prove a [197] coin current, if it be not otherwise commonly known.

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But proclamation is necessary in these cases following.

1. A proclamation with proclamation-writ under the great seal is necessary to legitimate and make current foreign coin, and without the proclamation it is neither current coin of this kingdom, nor is the counterfeiting, clipping or diminishing thereof treason within the statute of 1 Mar. or 5 or 18 Eliz. for the words in these statutes (*and by proclamation allowed and suffered to be current here*) refers only to foreign coin, not to the coin of this kingdom; but tho' it be not proclaimed, it is misprision of treason to counterfeit it by the statute of 14 Eliz. cap. 1.

The reason is especially because by the statute of 17 R. 2. cap. 1. no foreign coin of gold or silver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into English coin.

2. A proclamation under the great seal is necessary to legitimate base coin or mixt below the standard of Sterling, and for the dispensing within the statute of 25 E. 3. cap. 13. and 4 H. 5. cap. 6. and with application to that case the opinion of Sir John Davis's report touching the necessity of a proclamation seems to be good in law.

3. A proclamation under the great seal is necessary, when any coin already in being is inhanded to a higher denomination or extrinsic value; as when the twenty shillings piece of gold was raised to twenty-two shillings, because it was once current money under another denomination; thus it was done upon the inhanding of twenty shillings and ten shillings pieces by king James.

4. A proclamation is necessary when any money, that is current in usage or payment, is decried; thus it was done in the case of 43 Eliz. for the Sterling money in Ireland before mentioned; and thus it was done by the Pollards and Crocards tempore E. 1. (n) Dy. 82. and by the several base monies mentioned in *Articuli de moneta*, namely [198] the money with the mitre and with the lyons, which it seems were minted in England, besides the other foreign money therein mentioned (o).

5. Altho' in the case of money newly coined by the king's authority in England a proclamation is not absolutely necessary to the legitimation thereof or making it current, yet to induce a contempt upon such as refuse to take it in payment such proclamations have not

(n) Davis 21. 6. See the note in Rapin's hist. sub fine Ed. 1. case of the broad pieces of twenty-five shillings and twenty-three shillings.

(o) And thus it was lately done in the

been

seen altogether unusual, and by the red book of the exchequer seems necessary for that purpose; for how can men reasonably know at first, whether this be the king's coin without some such public notification, where long use and custom hath not made the stamp or coin familiarly known to those, that are to receive it: *vide* proclamations for money newly made principally upon this account, *Claus. 18 E. 3. part 1. m. 28 & 12. dorf. Claus. 18 E. 3. part 2. m. 14. dorf. Claus. 19 E. 3. part 1. m. 23 & part 2. m. 15. dorf. Claus. 20 E. 3. part 2. m. 20. dorf. and 25 E. 3. m. 14. dorf.* But yet the money is the lawful money of *England*, and he that counterfeits it is within the law of 25 E. 3. for treason, tho there be no such proclamation: *vide Libr. Rubr. Scaccarii, fol. 259.* "Imprimis oportet ut omnem monetam præcedat constructio alliaii, viz. ponderisque & numeri ipsius monete distincte & aptè continens moderamen, deinde inchoanda est & perficienda ex edicto aut licentiâ principis speciali, & publicandâ per proclamationem præconis ipsius principis publicè, ut mos exigit faciendum, & tunc usui apta erit: ita ut ex tunc non sit impunè a quoquam de populo recusanda. Quicunque autem clam vel aperte vel palam absque licentiâ principis cuiuscunque monetæ contrafactionem attemptasse convictus fuerit, corporaliter plectri solet."

And now I shall give a brief history of the variation of the coin of *England*.

It appears by all the antient monuments, that I have seen, that the use of coin or money was antient and long before the conquest (*p*).

It is true that *Gervafius Tilburiensis*, who wrote the black book of the exchequer in the time of *Henry II.* commonly [199] called *magister & discipulus, Lib. I. cap. à quibus & ad quid infinitata fuit argenti purgatio*, says, that in the times of king *William I. William II. and Henry I.* the antient farms of the king's demesnes were answered in cattle, corn, and other provisions in specie, because it saved the king the trouble of purveyors, and money was scarce among the people, and yet the reservations of their rents were in money, *viz.* so many pounds *numero*, or so many pounds *blanc*; *de quibus infra*.

And to make an equation between the provisions, that were answered in kind, and the rents that were reserved, there were certain rates or prices agreed upon almost all such provisions, as for wheat

(*p*) That money was coined here in the time of the *Saxons* is sufficiently plain, but it is very doubtful whether the *Britons* ever

coined any; in *Cæsar's* time they used only iron-rings, or pieces of brass; *Cæsar. Com. de B. G. lib. 5. n. 12.*

for

for one hundred men *per diem* twelve pence, for a fat ox twelve pence, &c. which it seems were delivered to the sheriff, and by him answered to the king in money or kind, as it was agreed.

But those farm rents, that were reserved out of the cities, boroughs, franchises, &c because they had not provisions in kind were answered in money according to their reservations.

In the time of *Henry I.* this answering of farms by provisions ceased, and the tenants paid their money according to the letter of their reservations; the king was weary of receiving, and the farmers weary of paying their rents in victuals and provisions, but money still was in use as the common instrument of commerce and valuation.

In the troublesome time of king *Stephen* we are told by *Roger Hoveden sub anno 1149. Omnes potentes tam episcopi, quam comites & barones suam faciebant monetam*, which occasioned a great confusion and corruption in money and commerce (*q*): *Henry II.* coming to the crown reformed this usurpation and abuse, *novam fecit monetam, quæ sola accepta erat & recepta in regno (r)*; and thus it hath hitherto obtained, only some particular corporations ecclesiastical, as [200] bishops and abbots had special privileges granted to them to have mints (*f*), some one stamp, some two, some more, which yet were sent to them from the king's exchequer, and their officers sworn to the king to deal faithfully in their offices.

Yet after this king's time, especially in the beginning of king *John's* time, there was a great uncertainty and disorder both in the weight and alloy of coin; for *Claus. 7 Johann.*, m. 24. *Sciatis quod recipimus per manum Petri de Ely, &c. trecentas libras numero, quæ ponderabant quingentas libras 47s. 8d.* and in the same roll, m. 25. *recipimus de Thesauro per manus Petri de Ely, 1725l. & 11s. 6d. numero, quæ ponderabant 1556l. 17s. 6d.* which holds no proportion with the former.

Henry III. had a troublesome reign, and malefactors abounded, especially in relation to the clipping of money; in his thirty-second year he made new money, and ordained *ne quis denarius, nisi legitimi*

(*q*) *William of Newbury* writes thus under the reign of king *Stephen*, *Erant in Anglia quodammodo ut reges vel potius tyranni quos domini castellorum, babentes fnguli percussuram proprii numismatis.*

(*r*) See *Wilk. Leg. Henry II.* p. 320. where these words are also added, *abdicata jam precorum illa*; the truth is, this reformation of the money began to be made to-

wards the latter end of *Stephen's* reign, for among the articles of peace between *Stephen* and *Henry* this was one, that the silver coin should be one and the same throughout the kingdom. *Ibid. p. 315. Mat. Paris. p. 139.*

(*f*) See a charter of king *John* allowing this privilege to *Habert archbishop of Canterbury, Wilk. Leg. Johnianus*, p. 355.

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ponderis & circularis formæ uteretur, clipt money not to be received but perforated, and divers offenders were hanged. Mat. Paris sub anno 1248. (1) but we have not the just standard or weight of his money.

In the time of Edward I. we know what the weight and alloy of his current money was, namely the alloy was *Sterling*, twenty shillings made a pound weight troy, and twenty pence an ounce, so that the pound of *Sterling* silver made two hundred forty *Sterling* pence.

There were other base monies in his time, as namely, those that were decried by the *Articuli de monetâ*, and *Pollards* and *Crocards*; what the value of the latter was I know not, but it appears by *Claus. 28 E. 1. m. 6.* quid pro qualibet libra pollardorum una marca Sterlinorum solvit ad *Scaccarium*: they were both decried in the 28 E. 1. (u) *Vide Dy. 81.* This rate of *Sterling* continued during some time of Edward II.

I have not seen any indentures of the mint between the time of Edward II. and the 46 Edward III. (x) and then by [201] the indenture of the mint *Claus. 46 E. 3. m. 18.* a pound of gold made forty-five nobles, each noble six shillings and eight pence, and was to consist of twenty-three carats, three grains and an half of fine gold, the rest alloy; the coinage to be four shillings for each pound for the master of the mint, and twelve pence for the king; the pound valued at fifteen pounds, and the merchants upon the return to have out of the Tower fourteen pounds fifteen shillings.

A pound of silver was to make three hundred pence, and so in that proportion groats, half-pence, and farthings, which was to be of the alloy *du viel Esterling*, viz. eleven ounces two-penny weight of fine silver, and eighteen penny weight of alloy; eight pence to be allowed for coinage.

The next Indenture I find is 3 H. 4. p. 2. m. 9. dorf. whereby a farther alteration was made.

The pound of gold made the same quantity of nobles, and was of the same alloy as before, only upon every pound was allowed three

(s) p. 747.

(u) As appears by the proclamation, *Quod Pollardi & Crokardi non currant in regno Angliae* *Claus. 28 E. 1. m. 12. dorf.* by which record it also appears, that two *Pollards* and one *Sterling* were much about the same value; for the words are *Licet super pro communi utilitate regni nostri de concilio nostro ordinavimus, quod duo Pollardi, vel duo Crokardi currant in eodem regno pro uno Sterlingo.*

(x) But among the records in the Tower there are several indentures to be found within that time, viz.

Claus. 18 E. 3. p. 2. m. 19. d.
Pat. 18 E. 3. p. 1. m. 27.
Claus. 23 E. 3. p. 1. m. 21. d.
Claus. 25 E. 3. m. 15. d.
Claus. 29 E. 3. m. 6. d.
Claus. 35 E. 3. m. 10. d.

shillings

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shillings and six pence to the master, and one shilling and six pence to the king for coinage.

The silver coin of the same fineness, weight and alloy, as by the indenture of 46 E. 3. the coinage eight pence, whereof seven pence to the master, and one penny to the king upon every pound weight.

Claus. 1 H. 5. n. 35. dorf. the alloy of gold and silver still the same as before, but some other variance there was.

The pound of gold was now to make fifty nobles, the value of the whole pound to be sixteen pounds thirteen shillings and four pence, the coinage five shillings.

[202] The pound of silver was to make three hundred and sixty pence, the coinage was nine pence to the master, and three pence to the king; so that now the pound of silver made thirty shillings *Sterling*, which began in *Rot. Parl.* 13 H. 4. n. 28. by ordinance of parliament.

Claus. 9 H. 5. n. 2. dorf. the same weight and alloy of gold, *viz.* every pound of gold to make fifty nobles, the coinage to the king three shillings and six pence, to the master eighteen pence.

The like as to silver in all points as by the indenture of 1 H. 5. only the master to have nine pence, the king three pence for coinage.

Claus. 1 H. 6. n. 13 & 15. The indenture agrees in all things with that of 9 H. 5.

Claus. 4 E. 4. n. 20. The king by proclamation inhanseth the value of coin, so that the noble of gold, which before was six shillings and eight pence, is now raised to eight shillings and four pence, three groats make a shilling, and so do twelve pence, and twenty shillings make a pound.

And afterwards he made new coins according to the standard of gold aforesaid, *viz.* the noble of gold eight shillings and four pence, and the pound of silver raised to thirty-seven shillings and six pence; and now I shall follow *John Stow* in his *Survey of London*, p. 47.

H. 7. raised the rate of *Sterling* silver coin to forty pence the ounce.
18 H. 8. the pound of silver coin was raised to forty shillings.

35 H. 8. the coin of gold was raised to forty shillings the ounce, the coin of silver to four shillings the ounce, and coins of base money, of alloy below *Sterling* were coined, *viz.* shillings, six-pences, four-pences, two-pences, pennies: these were decried in 5 E. 6. and the shilling reduced to nine-pence, and after to six pence (*y*).

• 30 Octob. 5 E. 6. Silver *Sterling* coin inhabited to five shillings the ounce, and so proportionably; and coins of fine gold, a whole [203] sovereign was thirty shillings, an angel ten shillings, and base money to pass as before.

2 Eliz. The base money was called in and brought to the mint and reduced to *Sterling* and new coined, and the dross given to repair the highways.

16 Novemb. 2 Jac. By proclamation the new coins of gold and silver then made, together with their impressions, inscriptions, weight, and values were proclaimed; and 23 Novemb. 9 Jac. per proclamation the coins of gold are inhabited, *viz.* thirty shillings to thirty-three shillings, twenty shillings to twenty-two shillings, fifteen shillings to sixteen shillings, ten shillings to eleven shillings, five shillings to five shillings and six-pence.

Upon these variations these things are nevertheless observable, *First*, That the old *Sterling* gold is this, that one pound of *Sterling* gold contains twenty-three carats three grains and a half of fine gold, the rest to make it up twenty-four carats is of alloy of copper. *Secondly*, That the old standard of *Sterling* silver is, that every pound weight of *Sterling* silver consist of eleven ounces two-penny weight of fine silver, and eighteen penny weight of alloy of copper. *Thirdly*, That this rate of *Sterling* gold and silver hath most plainly continued to be the standard of *English* gold and silver coin, at least from the time of *Henry III.* until this day in *England* without any considerable alteration, saving that base money, which was stampt in the time of *Henry VIII.* and then reduced to a lower valuation by *Edward VI.* and after re-established by *Edward VI.* to its former value. *Fourthly*, That, as well in *England* as *Ireland*, there hath been imbaſing of the species of money, as appears in these two instances in the time of *Henry VIII.* and *Edward VI.* which are yet the only instances that I find of that nature in *England*. *Fifthly*, That queen *Elizabeth* decried by proclamation all that base money, which was in use in the time of her father and brother, and ever since that proclamation, *viz.* 2 Eliz. the true old *Sterling* standard both of gold and silver hath been the only standard of the *English* current money. *Sixthly*, That altho the standard of *Sterling* hath with great constancy obtained in *England*, yet the denomination or extrinsic or imposed value hath varied according to the pleasure of the king both as to gold and silver coin, as appears by what goes before; for in *Ed-*

ward I's time the ounce of *Sterling* silver was twenty pence, the pound twenty shillings or two hundred and forty pence; in *Edward III*'s time the pound of *Sterling* was three hundred pence; in the time of *Henry V.* and so downward to *Edward IV.* three hundred and sixty pence, or, which is all one, thirty shillings; in the time of *Edward IV.* the pound of silver was thirty-seven shillings and sixpence; in 35 *H. 8.* the pound of *Sterling* silver was forty shillings; in 5 *E. 6.* and so down to this day the ounce of silver five shillings or sixty pence, and the pound of *Sterling* silver three pounds or seven hundred and twenty pence, which in *Edward I*'s time was only two hundred and forty pence, which now is thrice as much as then it was. *Seventhly,* That I find rarely any proclamation for the setting of the rate of new coin, but only as before, when the denomination of what is in being is inhansed, or abated, or recalled; so that the indenture of the mint and common reputation is that, which must try what is *English* money. *Eighthly,* That I never find either in the indentures of the mint or any proclamation the stamp, impression, or inscription described, unless in that of king *James*, because the stamps are agreed upon between the king and the master of the mint, and delivered to him by the king, or his warrant either of the great seal, privy seal, signet, or secretary of state.

Concerning the adulteration or impairing of coin, and the ancient means used to remedy it.

THE decays or impairment of coin is either in weight or alloy, the former may happen by some abuse of the moniers or minters, or by the subtlety of clippers, washers and other impairers of coin; the latter, *viz.* impairment in alloy, can only happen either by the dishonesty of the moniers or minters, or by the counterfeiting of coin.

Antiently all money was paid in number, namely so many pieces made a pound, and this was the common reservation and account of all farms, and the estimating of accounts, *vicecomes A. reddit compotum de 100l. numero, or in thesauro 100l. numero.*

But

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But this did not answer all intentions, for the money that was paid in, might be clipt, or otherwise rendered light, or might be counterfeit, or of base alloy.

For remedy thereof there was practised these three methods of rectifications of payments at the exchequer, that the king might not be deceived, and these were successively used in the exchequer, which we may read *Gervas. Tilb. Lib. I. supra quibus.*

1. *Solutio ad scalam*, which it seems was a dish or measure, whereby they measured their money, as well as told it, for that is the proper signification of *scala*: but in process of time this was turned into a measure of money, which was an addition of six-pence for every pound, to avoid the trouble of that probation, whereby an hundred pounds *numero* amounted to an hundred pounds and fifty shillings *ad scalam*; and so we have frequently in the old pipe rolls of *Henry II.* *Richard I.* *king John,* &c. in *thesauro* 100*l. ad scalam.*

2. *Solutio ad pensum*, which was the answering of every [206] pound of money by weight of a pound weight troy, for in those times the *libra argenti* coin did or was to answer a pound weight troy, and therefore the payer was to make it good of that weight by answering the full weight; this gave the frequent title of the old pipe-rolls, also in *thesauro* 100*l. ad pensum.*

But altho this *solutio ad scalam* or *ad pensum*, especially both together, did give some help against the defect of coin in weight, as by clipping, washing, or the like, yet it did not help as to adulterate money of baser alloy than the standard: Therefore,

3. There was found out in the time of *Henry II.* a third trial, namely trial by fire or combustion, and if it were of the just alloy it was allowed, if below the alloy the payer was to make it good, and hence he was said *dealbare firmam*; and hence grew quickly a difference between reservations and payments of so much money *numero*, and so much money *blanc.*

A reservation of so much money generally was intended of so much *numero*, as if a pound were reserved, it was in effect but twenty shillings *in pecuniis numeratis*; but if it were expressly said so much money *blanc*, then it was answered in *blanc* money, but yet with this difference, that if a farm were letten and so much rent generally reserved, it should be intended so much *numero*, *in pecuniis numeratis*; but if a franchise or liberty were granted, and so much rent generally reserved without saying *blanc* or *numero*, it was commonly intended

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blanc, unless expressly said *reddenda* so much money *numero*, and therefore in such a case the former was bound *dealbare firmam*, that is, to answer so much as would make his payment to be so much good in fine silver, or very near it at least, *Gervaf. Tilb. Lib. II. cap. quid sit, quodam fundo dari blanc, quodam numero.*

And therefore upon all the antient accounts in the pipe, made by the sheriff, we shall find some of his accounts of rents to run *numero*, some of them to run *blanc*, viz. *firma comitatis numero*, & *firma comitatis blanc*, according to the variety of their reservations [207] or the things out of which they are reserved; now what the proportion was, between so much money *blanc* and so much money *numero* in those antient times, or what this *blanc* money was, is worth the inquiring.

I have formerly thought that *blanc* money was nothing else but *Sterling*, and that *dealbare firmam* was no more, than to reduce money to the true alloy of *Sterling*; but upon consideration I think *blanc* money was truly so much fine silver without any alloy, and that the true alloy of *Sterling* silver or the antient standard was twelve penny weight only of copper to every pound weight of silver; and therefore he, that upon his reservation was to pay one hundred pounds of *blanc* money, was to answer to the king upon every pound of *Sterling* money one shilling to countervail the value of the alloy of copper in every pound weight troy of silver.

And hence it is, that the farms of most corporations antiently let with liberties, if one hundred pounds *per annum* were reserved, usually answered one hundred and five pounds, the five pounds being to answer the alloy of one of copper in the whole quantity.

21 H. 3. *in compoto comitatis North'ton summa totalis 102l. 13s. 7d. de quo 4l. 9s. 4d. blanc, quæ sunt extensæ ad 4l. 13s. 9d. subtrahuntur ad perficiendum corpus comitatis, & remanet 97l. 13s. 10d. (a) de quibus respondet de proficuo in magno rotulo.*

Claus. 19 H. 3. p. 1. m. 2. Scialis quid pardonavimus dilector & fideli nostræ A. comitissæ Pembroch centum triginta & quinque libras blanc, quæ extensæ sunt ad 141l. 15s.

13 E. 3. *in compoto Bedford & Bucks, Nicholaus Bafflew 18l. 4s. 4d. numero pro 17l. 7s. blanc.*

That of 19 H. 3. exactly answers twelve pence per pound, which amounts to six pounds fifteen shillings, and added to one hundred

(a) This should be 97l. 9s. 10d.

thirty-five pounds make just one hundred forty-one pounds fifteen shillings.

And the other estimate is very near the same account, bating the difficulty of small fractions, four pounds nine shillings and four pence, with the adding of twelve pence for every pound to [208] make it *Sterling*, amounts to about four shillings and six pence, which added to four pounds nine shillings and four pence make four pounds thirteen shillings and ten pence; so the alloy of *Sterling* at that time seems to be twelve pence of copper to every pound of silver.

The sum therefore is, 1. That *blanc ferme* or *blanc* money was the estimate of money in pure silver without alloy, and accordingly it was to be answered, *viz.* one hundred pounds *blanc* was to answer one hundred and five pounds *numero*. 2. That a *ferme* or sum of money *numero* was so much *Sterling* money according to the standard of those times. 3. That the standard of *Sterling* money in those times was finer than it hath been since the time of *Edward I.* namely *Sterling* was then eleven ounces eight penny weight finer silver, and twelve penny weight of alloy. 4. That when at the exchequer they burnt the money to make assay of it, in case twenty shillings *numero* were reserved, it sufficed if it held the alloy of *Sterling*, *viz.* eleven ounces, eight penny weight of pure silver, and twelve penny weight of alloy; but if it were reserved *blanc*, then the good *Sterling* was brought to the test, yet it went for less than *Sterling* by twelve penny weight in every pound, and therefore they were to add five pounds in the hundred to make it up *blanc*. 5. But when this probation grew troublesome, and *Sterling* money was well established, then they, that were to pay one hundred pounds *blanc*, paid one hundred and five pounds *Sterling*, as the common estimate of *blanc* money: it seems that in king *John's* time the standard of *Sterling* money was far lower and worse, than at any time before or after, especially towards the latter end of his reign.

The borough of *Wich* was antiently from the conquest till 17 *Johann.* held at the yearly rent of eighty pounds *per annum blanc*, which was answered by the sheriff in the times of *Henry II.* and *Richard I.*

7 *Johann.* the king granted the borough of *Wich* to the town at the farm rent of one hundred pounds *Sterling*: in the pipe-roll of 24 *H. 3. homines de Wico reddunt compotum de 100l.* [209] *numero, pro 80l. blanc*, which imports these sums to be equal, and afterwards 43 *H. 3. homines de Wico reddunt compotum de 80l. blanc,*

*que sunt extensæ ad 84*L** and in 17 *E. 3.* this eighty-four pounds was raised to eighty-nine pounds five shillings *numero* upon the extent, which *ferme* of eighty-nine pounds five shillings they have ever since answered; whereby it appears the standard of *Sterling* was but low in king *John's* time, for eighty pounds *blanc* was in his charter estimated at one hundred pounds *Sterling*: again it was high in 43 *H. 3.* viz. after the rate of twelve penny weight of allay in a pound of fine silver; for there, eighty-four pounds *Sterling* is rated to be eighty pounds *blanc*; and in *Edward III.* the standard was lower, than twelve penny weight of allay, viz. above twenty-four penny weight of allay in a pound weight of fine silver; but afterwards raised to eighteen penny weight of allay towards the latter end of his reign, which hath hitherto continued as the true standard of *Sterling* silver.

These curiosities, tho they be not much in use at this day, yet they are fit to be known for understanding the old rolls.

¹ Hawk. P. C. 42.

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C H A P. XIX.

Concerning the counterfeiting of the king's coin what it is, what the penalty thereof antiently, and what at this day.

HAVING taken this compass I now descend to the offense itself, wherein I shall consider, 1. What is the coin or money of the king. 2. What a counterfeiting thereof. 3. What the punishment before this statute. 4. What the punishment since this statute.

I. What shall be said the king's money.

The money of a foreign kingdom is not the king's money within this act, and therefore at common law the counterfeiting thereof was only punishable as a cheat; and now by the statute of 14 *Eliz. cap. 3.* it is made misprision of treason to counterfeit any foreign coin of gold or silver, tho not made current here by proclamation.

The money of a foreign kingdom made current by proclamation, tho it be now, as to all civil respects, the proper money of this kingdom, yet, as to the crime of treason, it was not the king's money within this act.

And

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And therefore a special statute was made, *viz.* 1 Mar. cap. 6. that if any person falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the queen, her heirs or successors, then such offense shall be judged high treason.

This consent cannot be but under the great seal, *viz.* by proclamation and a writ under the great seal annexed thereto, or some other sufficient notification under the great seal; and it must be of money of gold or silver, which I take to be a denomination *ex majore parte*, if it be such a foreign coin as is, for the most part, of gold or silver.

But even the counterfeiting in copper or brass gilt, or in tin or alchymy, if the exemplar itself be of gold or silver, is [211] within this act of 1 Mar. cap. 6.

If the coin of *Ireland* doth not substantially differ in the signature or impression from the coin of *England*, the counterfeiting of that money here in *England* seems to be a counterfeiting of the king's coin here in *England*; but if the stamp or impression bear no such resemblance, as is easily discernable, then it is considerable, whether it be a counterfeiting of the king's coin here, for *Ireland* is a distinct kingdom from *England*, tho' part of the dominions of the crown of *England*.

Yet it seems that it is treason within the act of 25 E. 3. 1 Because the words of the statute are *sa monoye*, and not specially the money of *England*, and money coined by the king's authority in *Ireland* is *sa monoye*, tho' it be not the current money of *England*. 2. Because by the express words of the statute of 25 Eliz. the clipping of coin of this realm, or any the dominions thereof, is enacted to be treason; it is not to be supposed that the parliament would make the clipping of *Irish* coin treason, unless the counterfeiting thereof were treason; and with this the resolution of the case of mixt monies in Sir John Davys's reports agrees, *viz.* that the imbased coin stamp for *Ireland* is lawful money for *England* within the condition of a bond for payment of money in *Ireland*.

What shall we say concerning the farthings and halfpence of copper newly minted in *England*, and proclaimed as before to be current money, is the counterfeiting thereof treason.

It is true, in antient proclamations for farthing-tokens it was not usual to be, that it should be current money, but only that it should be used as tokens, and the punishment of counterfeiters was either in the star-chamber, or by information or indictment, and fine and imprisonment in the king's bench.

And

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And yet it seems to me, that this proclamation makes it not the king's money within this act of 25 E. 3. 1. Because it is so made only to a special purpose, namely in receipts and payments under six-pence, and not otherwise. 2. Because here is no dispensation or *non obstante* of the statute of 25 E. 3. Again, when by the [212] statute of 25 E. 3. cap. 13. it is enacted, that the money of gold or silver which now runneth shall not be impaired in weight or allay, we can hardly think it ever intended that the copper money should be that money, which should be intended within the act made at the same parliament touching treason; but *quære tamen*.

If money be decried and varies signally from the stamp and impression in the coin that is commonly allowed, this is not money within this act, for it hath lost its denomination and legitimation by the king's proclamation (*a*).

The money of an usurper bearing his stamp and effigies and inscription, is the king's money in the time of the succeeding rightful king, till it be recalled by proclamation. If, upon the evidence against any counterfeiter of the king's coin, tho it be but of a late coinage or impression, it comes in question whether the coin that is counterfeited were the coin of this kingdom, it is not necessary to produce a proclamation to prove its legitimation for these reasons; 1. Because where there were proclamations of coin they are for the most part lost: if we should be put to prove a proclamation for the coins of queen *Mary*, queen *Elizabeth*, where should we find them? 2. Because in most kings times there are variations of the impressions without any proclamation, or so much as a new indenture between the king and the master of the mint. 3. Because there are very few proclamations, except that before-mentioned in king *James*'s time, that express any more than the weight and allay, but the impression or effigies is rarely, if at all, expressed, and so such proclamation would import little to ascertain the effigies or stamps; and for the same reason the indenture of the mint is not absolutely necessary, tho in some cases it may be useful. 4. Because especially in antient coins *ex diuturnitate temporis omnia præsumuntur rite acta*, if proclamation or indenture be necessary, it shall be presumed in length of time, as a licence of appropriation shall be presumed by long continuance, tho not shewn.

(*a*) For this reason when the broad pieces were cried down, and the officers of the revenue charged to take them in payment for one year after, it was thought

necessary by a special act of parliament 6 Geo. II. cap. 26. to make the counterfeiting of them during that year treason.

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The question therefore, whether the coin that is counterfeited be the coin of this kingdom, is a question of fact, which upon evidence of common usage, reputation, &c. may be found to be *English* coin, tho no proclamation of it extant.

But it may be of some use in case of newness of coin to produce the indentures, or the officers of the mint, or the stamps here used for the coin, and the like evidences of fact.

But as to foreign coin legitimated here, it seems necessary to shew the proclamation, together with the proclamation-writ, or a remembrance thereof; and this is expressly required by the statutes of 5 & 18 Eliz. for impairing or clipping foreign coin.

II. I come to the second consideration, what is a counterfeiting within this law.

And before I come to particulars it must be remembered, that the misfeasances concerning coin refer to two sorts of persons; *first*, to such as are authorized either by their office, or by charter, or by custom to coin money; *monetarii*, moneyers, minters; or *secondly*, those who do counterfeit, or take upon them the stamping of coin without such authority, counterfeiters, clippers, walmers, &c.

Touching the former of these 3 H. 7. 10. (b) *Si ipse, qui facit monetam in Anglia authoritate regia infra turrim London vel alibi in Anglia vel Calicia, illam facit minus in pondere per dimidium ordinantis antiqui ponderis, &c. vel falso metallo, est proditio, & tamen ipsi, qui illam monetam uterant ligeis domini regis infra Angliam non sunt proditores nec proditio, sed misprisio.*

But it is not every mistake in weight or alloy, that chargeth the moneyers with so high a crime as treason, for the master is chargeable by his indentures to a fine and ransom for some mistakes of this nature; but it must be a wilful gross proditorious doing it, for the indictment runs *proditorie*, and so it must be proved, for it is difficult for the best artist to make every piece of the precise weight.

Touching others that either counterfeit or imbase the [214] coin.

First, There must be an actual counterfeiting, for a compassing, conspiracy or attempt to counterfeit is not treason within this statute without an actual counterfeiting.

But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason

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in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals.

How far a receiver is a principal, *videbimus infra Co. Pla. Cor. 138. Dyer 296.*

If *A.* counterfeits, and by agreement before that counterfeiting *B.* is to take off and vent the counterfeit money, *B.* is an aider and abettor to such counterfeiting, and consequently a principal traitor within this law; but if *B.* knowing that *A.* hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be all one with a receiver of him, because he maintains him.

If *A.* counterfeit money, and *B.* knowing the money to be counterfeit vent the same for his own benefit, *B.* is neither guilty of treason nor misprision of treason, but it is only a cheat and misdemeanor in him punishable by fine and imprisonment.

But if *B.* know that *A.* counterfeited it, and doth neither receive, maintain, or abet him, but conceals his knowledge, this is misprision of treason; and with this difference the book of 3 H. 7. above-cited is to be understood, and so it was ruled upon debate at the sessions at Newgate Cor. 2. *ex libro Bridgman (c).*

A. fashions stamps for the counterfeiting of money, but he is discovered and apprehended before he hath actually counterfeited it; this is no treason within this statute (*d*), for tho he hath counterfeited the stamps, yet he hath not counterfeited the money of *England*.

[215] *A.* counterfeits the king's money, but never vents it; this is a counterfeiting, and treason within this statute, and so it hath been ruled *Co. P. C. p. 16.*

A. counterfeits the coin of this kingdom or any foreign coin of silver or gold of any foreign kingdom (*e*), and this counterfeiting is in another metal, as tin, lead, alchymy, copper gilt or silvered over, yet the former is treason within the statute of 25 E. 3. and the latter within the statute of 1 Mar. If there be a lawful coin of this kingdom, and *A.* doth counterfeit it in a considerable measure, but yet with some small variation in the inscription, effigies, or arms, to the intent thereby to evade the statute, yet this is a counterfeiting of the king's mo-

(c) *Aug. 16 Car. 2;* in the case of *Richard Oliver, Kal. 33,*
(d) *1 Rich. 3. 1.* but it is treason by the
Statutes of 8 & 9 W. 3. cap. 25, and 7 Ann.
cap. 26.

(e) This must be supposed to be foreign
coin current within the realm, for to coun-
terfeit other coin is only misprision by 24
Eitz. proest patet supra.

ney,

mey, and that intent doth unquestionably appear, if he vent it as true: *vide supra de privato signeto.* 16 Jac. (f).

The clipping, washing, or impairing, &c. of foreign coin made current by proclamation most certainly was not treason by the statute of 25 E. 3. but was made treason *de novo* by the statute of 5 & 18 Eliz.

But whether the clipping, washing, or impairing the proper coin of this realm for lucre or gain were treasons within this statute of 25 E. 3. or not, is a question that deserves consideration, which, tho' it be now settled by those statutes to be treason, yet it is of moment to be known; if it were and continues treason by the act of 25 E. 3. then the judgment is only to be drawn and hanged; if it be a new made treason, then by my lord Coke's opinion the judgement must be to be hanged, beheaded, and quartered, as in treason for compassing the king's death. *Co. P. C. p. 17.*

I will therefore give the history of this business of washing, clipping, &c. ab origine from the time of the statute of 25 E. 3. for the history of former times at common law will be given in the next section.

It appears by the record of M. 31 E. 3. coram rege rot. 18, 55. *Bucks*, cited by *Co. P. C. p. 17.* within six years after the statute of 25 E. 3. that for counterfeiting and refection of the king's coin *the abbot of Muffenden* was adjudged to be drawn and [216] hanged, but not quartered.

By the statute of 3 H. 5. cap. 6. clipping, washing, and filing of the money of the land is declared to be treason, and the offenders to be traitors, and shall incur the pain of treason; this was made to settle the doubt, and not purely as a new law.

The petition, upon which this act was made, is more full than the act, as it is printed, *Rot. Parl. 3 H. 5. part 2. n. 40.* " Item pryont " les commons, qe come devant ces heures grand doubt & awerestee " ad este, le quelle le tonsure, loture, filing, & autre fauxisme de " vostre monoy duissent estre adjugge treason ou nient, a cause qe null " mention ent est fait en le declaration des articles de treason faits en " le parlement de vostre treynoble besaijal lan de son raigne 25. Plesse " a vostre royal majestee de ordeiner, declarer, & determiner en cest " present parlement par authority dicel, qe ceux, qe tondent, loient, " filent, ou ascun autre fauxisme facent de vostre mony, soient ad- " jugges traytors, & encurgent le pain de treason, si bien como ceux " qe apportent faux money en *Engleterre* sachant la estre faux, & qe

(f) *Robinson's case, 2 Rot. Rep. 50.*

" cest

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" cest declaration si bien soy extende al tiels tonsure, loture, & faux-
" isme faits avant ces heures come a faire en temps avener. Ro.
" Quant a le loture, tonsure & fileigne soit il declare pur treason."

Nota, A retrospect desired, which was not usual, unless the law had held it treason before.

By the statute of 4 H. 7. cap. 19. counterfeiting or forging of foreign coin current here is enacted to be treason, which before was neither felony nor treason.

By the statute of 1 E. 6. cap. 12. it is enacted, that there be no other treason nor petty treason, but what was ordained by the statute of 25 E. 3. or by that act; and after certain new treasons enacted there is a *proviso*, that this act extends not to repeal any act of parliament concerning the counterfeiting, forging, clipping, washing or filing any coin of this realm, or any coin of other realms made current here, or the bringing into the realm any counterfeit coin.

[217] This proviso was absolutely necessary in relation to the treason in counterfeiting foreign coin contrary to the statute of 4 H. 7. cap. 18. because a new treason, but whether necessary in relation to clipping or impairing the coin of *England* declared to be treason by the statute of 3 H. 5. may be doubtful upon what herein after follows, but certainly was very fit and convenient to avoid the question.

By the statute of 1 Mar. cap. 1. it is enacted, that no offense being by act of parliament or statute made treason, petit treason, or misprision of treason, by words, writing, or cyphering, deeds, or otherwise howsoever, shall be adjudged to be high treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason in or by the act of parliament of the twenty-fifth year of king *Edward III.* concerning treason, nor any pains, penalty or forfeiture to ensue upon any offender in treason, petit treason, or misprision of treason, than such as are ordained by that statute; and all offenses made felony or *præmunire* since 1 H. 8. not being felony or within the statutes of *præmunire* before, and all articles, &c. concerning the same are repealed.

And yet it appears by the statute of 1 & 2 Ph. & M. cap. 11. that then, notwithstanding the statute of 1 Mar. cap. 1. they did take the impairing as well as forging or counterfeiting the king's coin to remain treason; for, by that statute of 1 & 2 P. & M. cap. 11. that makes the importation of foreign counterfeit coin to be high treason, it is provided, that any that shall be accused of the offenses contained in

in the same statute, or any other offense concerning the impairing, counterfeiting or forging of any coin current within this kingdom, shall be indicted, arraigned, tried, convicted and attainted by such like evidence, and in such manner and form as hath been used in *England* at any time before the first year of the reign of king *Edward VI.*

So that it seems they took impairing of any coin current to be a treason in force, but on the other side it may be said, so they took also the forging of any foreign coin current to be treason, when as yet the statute of 4. H. 7. concerning forging of foreign coin made current stood repealed by 1 E. 6. but it is plain that no such consequence could be made, for by the statute of 1 Mar. [218] *Jeff. 2. cap. 6.* forging of foreign coin made current here is enacted to be treason; so that as to the point of foreign coin made current here, tho the statute of 4 H. 7. *cap. 18.* stood repealed, yet 1 Mar. *cap. 6.* stood in force at the time of the making of the statute of 1 & 2 P. & M. *cap. 11.*

Then ensues the statute of 5 Eliz. *cap. 11.* which reciting in express words, that the statute of 3 H. 5. concerning clipping, &c. is repealed by 1 Mar. *cap. 1.* and the mischief that happens thereby, namely, " That if, after the first day of May next, clipping, washing, rounding, or filing for wicked lucre or gain's sake any of the proper monies or coins of this realm or the dominions thereof, or the monies or coins of any other realm allowed and suffered to be current within this realm, or the dominions thereof, or that hereafter at any time shall be lawful monies or coins of this realm or of the dominions thereof, or of any other realm, and by proclamation allowed and suffered to be current here by the queen, her heirs or successors, shall be taken, deemed, and adjudged by virtue of this act to be treason, and the offenders, their counsellors, consenters and aiders shall from and after the first day of *May* be deemed traitors, and suffer pain of death and forfeit their goods, and forfeit all their lands during their lives only.

" That all, that by charter have lands or goods of traitors within their liberties, shall have these: a *proviso* that this act make no corruption of blood or loss of dower."

And the act of 18 Eliz. *cap. 1.* declaring that the falsifying, impairing, diminishing, scaling, or lightning of money was not within the act of 5 Eliz. which ought to be taken strictly according to the words thereof, and the like offenses not by any equity to receive the like

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like punishments or pains, enacts those offenses to be treason almost *in totidem verbis* with that of 5 Eliz. with the like proviso; and note this clause in both statutes, and the offenders being lawfully thereof convicted or attainted according to the due order and course of the laws of this realm shall suffer the pains of death.

[219] These acts do, in effect, declare, that this was not treason within the statute of 25 E. 3. and that the statute of 1 Mar. cap. 1. repealed that declaration that was made in 3. H. 5. and gives the reason, because the law being penal ought to be taken and expounded strictly according to the words, and the like offenses not by any equity to receive the like punishment, and therefore lightning or scaling were not within the act of 5 Eliz. and neither within the act of 25 E. 3. against counterfeiting the coin.

And yet it is observable, that those very judges, which were present at the making of the statute of 5 Eliz. yet upon a solemn consideration in *Wright's case*, T. 6 Eliz. Dyer 230. did agree, that the judgment in treason *pro tonsurâ monetae Angliae* is no other but to be drawn and hanged, and accordingly judgment was given in that case; and upon search of the precedents at *Newgate* I find, that altho some judgments in case of clipping of money are to be drawn, hanged, beheaded and quartered; yet the greater number both of former and latter times have been only to be drawn and hanged (*g*) according to the judgment in 6 Eliz.

And therefore my lord Coke, Pl. Cor. p. 17. tho he agree, that the judgment for counterfeiting the coin of *England* is only to be hanged and drawn, as it was before the statute of 25 E. 3. seems nevertheless to be mistaken, when in the same page he saith, that if any be attainted for diminishing the king's money upon the statutes made in the time of queen *Mary* or Queen *Elizabeth*, because it is high treason newly made, the offender shall have judgment as in the case of high treason, *viz.* to be drawn, hanged, beheaded, dismembred, quartered, &c. for the greater number and better precedents run only to be drawn and hanged; and so it was lately ruled upon great consideration in a case in the king's bench (*h*), tho perchance it is not error, whether the one judgment or other be given.

Upon the whole matter therefore it seems to me, 1. That altho it [220] should be admitted, that clipping of the coin of *England* continued treason notwithstanding the statute of 1 Mar. that yet

(g) *Morgan's case*, Cre. Cor. 383. 2 *Rep.* 234. 2 *Lov. 92. Regn. 234.*
(h) *The case of Bellon and Norman*.

It is, at this day, treason merely by the statute of 5 *Eliz.* and therefore every indictment, at this day, for clipping or impairing, &c. must pursue the words of the statutes of 5 & 18 *Eliz.* and conclude *contra formam statuti*; and this, not only in the case of clipping of foreign coin, which certainly was no treason after 1 *Mar.* and before 5 *Eliz.* but also in relation to the coin of *England*; and the reason is, 1. Because this statute hath added a qualification to these treasons of clipping or lightning, *viz.* it must be *for lucre's sake*, which must be expressly laid in the indictment, but need not have been so laid by the statute of 3 *H.* 5, for tho, perchance, it was intended, yet it was not expressed in that statute, neither needed it then to have been in the indictment. 2. Because in express words the statutes of 5 & 18 *Eliz.* say, that it shall be treason by virtue of this statute, which is not a bare recital as in the beginning of the statute, that the statute of 3 *H.* 5. was repealed; but it is also an express enacting clause, which is in effect exclusive of any other law to make it treason, but this of 5 or 18 *Eliz.* for these words are in both the statutes. 3. Because it extremely alters the consequences of a judgment in treason, for here was no loss of dower, no loss of land but during life, no corruption of blood, so that these statutes did perfectly intend a total new establishment and qualification of this treason.

2. That altho this be a new law, yet inasmuch as neither at common law, nor after the statute of 25 *E. 3.* the treasons or offenses concerning money had any greater judgment than such as is given in case of petit treason, namely for the man to be drawn and hanged, the woman to be burnt, no higher or other judgment is to be given upon the statutes of the 5th or 18th *Eliz.* and hence it is, that in the statute of 25 *E. 3.* tho it rank counterfeiting money among high treasons, yet it alters not the judgment that was at common law; nay tho it be most certain, that the statute of 25 *E. 3.* as to some points of bringing in foreign money be introductory of a new law, yet inasmuch as it concerns money, wherein the highest judgment at the time of 25 *E. 3* was only that of petit treason, it doth not [221] enhance the judgment higher; and accordingly it was resolved upon great advice and consideration of precedents *Car. 2. Banco Regis* in the case (*i*) for clipping *English* coin.

3. That upon any trial of counterfeiting, clipping, washing, &c. the coin of *England* or foreign coin made current, there is no necessity

(*i*) This I take to be the forecited case of *Bellot and Norman*, 1 *Ves.* 254.
either

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either upon the trial or the indictment of two witnesses, required in other cases by the statutes of 1 E. 6. cap. 12. and 5 E. 6. cap. 11.

For as to the counterfeiting of money, or so much as was treason for impairing money, by 1 & 2 P. & M. cap. 11. it is expressly provided, that no other evidence shall be requisite either upon the indictment or trial than was before the statute of 1 E. 6. and as to clipping and washing, the very statutes of 5 and 18 Eliz. in express terms require only a conviction and attainer according to the order and course of the law ; and therefore though the statute of 5 E. 6. cap. 11. enacts, that two witnesses or lawful accusers shall be required upon proceeding for any treason, that now be or hereafter shall be, yet that act is thus far derogated by those two acts, that require only an indictment, a conviction and attainer according to the order and course of the law generally ; for tho' it be held, that the statute of 1 & 2 P. & M. cap. 10. that enacts, that all trials of treason shall be according to the course of the common law, doth not take away the necessity of two witnesses upon the indictment, because that is a distinct thing from the trial. 14. Eliz. lord *Lynley's* case, Dy. 99. Co. P. C. p. 25. yet the words (*conviction and attainer after the order and course of the law*) mentioned in the statutes of 5 & 18 Eliz. include the indictment as well as the trial, and therefore even without the aid of the statute of 1 & 2 P. & M. cap. 11. restores the whole proceeding according to the order of the common law in case of clipping or washing, as the statute of 1 & 2 Ph. & Mar. doth in express words in case of counterfeiting.

And note, upon the statutes of 5 & 18 Eliz. tho' Irish coin be not current in England, when of a baser alloy, yet it is the king's [222] coin, and clipping or washing in England the coin of Ireland is treason by those acts, for the words are *the coin of this realm, or dominions thereof*, which extends to Ireland.

4. The fourth thing observable upon these statutes is, that the act of 1 Mar. cap. 1. reducing all treasons to the standard of 25 E. 3. doth not only repeal treasons, that were newly enacted *de novo*, but such acts concerning treason as were only declarative, as this of 3 H. 5. among others.

IV. The fourth thing that I propounded to consider, is the history of the punishment of counterfeitors, &c. of coin before the statute of 25 E. 3. and how it hath stood since.

In this kingdom and indeed in all the kingdoms the counterfeiting of

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the king's money hath been in all ages *crimen lœse majestatis* (*k*), tho in many of the old books (*l*) it comes under the general title of *crimen falsi*.

But the punishment in its kind and degree hath among us very much varied both in relation to the *monetarii* or moneyers, that were intrusted with the making of coin, and others, that took upon them to counterfeit the king's coin : among the laws of king *Athelstan*, *l.* 19. set down by *Brompton*, p. 843. *Una moneta sit in toto regni imperio, & nullus monetet extra portum, si monitarius reus fuerit, amputetur ei manus, & ponatur supra monetæ fabricam, accord Hoveden sub anno 1127. & M. Paris sub anno 1125* (*m*).

In the time of *Henry I.* it is written by *Simon Dunelmensis*, p. 214: *Monetarii totius Angliae principales deprehensi adulterinos, scilicet non puros ex argento, fecisse denarios, jussu regis simul Wintonæ congregati omnes unâ die amputatis dextris evirantur ; Et ibidem p. [223] 231. Qui falsos denarios fecerit, oculos et inferiores partes corporis perdet ; and Knighton, p. 2377. H. 1. statuit, ut fures suspenderentur, falsarii oculos & genitalia amitterent, & ut denarii & oboli essent rotundi* (*n*).

Knighton, p. 2463. “ *Edwardus primus tenuit parliamentum apud “ London, fecit mutari monetam regni, quæ illo tempore fuit vilitè “ retorta & abbreviata, unde populus regni graviter conquerebatur, “ & rex veritatem inquirens, & comperiens trecentos & plures de “ illo delicto & feloniam publicè convictos, quorum quidam fuerunt “ suspensi, quidam distracti & suspensi secundum delicti quantitatem “ et qualitatem, & ordinavit, quòd deinde *Sterlingus* & quadrans “ deinceps essent rotundi :*” so that clipping was then held treason, or at least felony.

After the statute of 25 *E. 3.* the punishment hath been constantly to be drawn and hanged, because that was the proper judgment of it, before the making of the statute.

(*k*) By the old Roman law, *Qui nassus carceres, argenteos adulteraverit, leverit, confluverit, resfrerit, corasperit, vitiaverit, vulnere principum signatum monetam, præter adulterinam, reproboverit, buncius in insulam deportandas, buncius aut in metallum damnandi, aut in cruce tollendas* ; and whatever degree he was of, *quis bono fisco vindictatur* : see *Jul. Pauli sententias receptas*, *Lib. V. tit. 12. §. 12.* and *Lib. V. tit. 25. §. 2.* Afterwards by a law of *Constantine*, *Codicis personæ obnoxii majestatis crimen committitum, & qui ex quo solidorum adulter*

poterit reperiri, flammam exstitionibus mancipetur, *Lib. IX. Cod. tit. 24. l. 2.* See also *Wilkin's Leges Anglo. Sax.* p. 59. in notis.

(*l*) *Braeton*, *Lib. III. de corona, cap. 3. §. 1. Glanvill. Lib. XIV. cap. 7, Fleet. Lib. I. cap. 22.*

(*m*) *Leges Ethelstani*, *l. 14. Wilk. Leg. Anglo-Sax.* p. 59. See also *Leges Edgaris*, *l. 8. Constitutiones Ethelredi in fine. Leges Canti, l. 8.*

(*n*) *Wilk. Leg. Hen. I. p. 304. sub anno 1108. p. 308. sub anno 1125.*

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And altho the course hath been in treasons concerning the king's person not to allow the privilege of clergy, yet before 25 E. 3. cap. 4. *pro clero* it had been thought and practised in antient time to allow the privilege of clergy upon an indictment for counterfeiting money (o).

But after that statute clergy was not allowable in case of counterfeiting money, 19 H. 6. 47 b. *Stamf Pla. Cor.* 114 b. yet whereas in cases of treason regularly he that stands mute shall be thereby convicted 15 E. 4. 33 a. *Stamf. Pla. Cor.* 150 a. because not within the statute of *Westmin.* 1. cap. 12. (p) yet we have some historical instances, that upon indictment of counterfeiting coin the prisoner standing mute was put to *pain fort & dure*. *Knighton tempore R. 2.*

[224] *sub anno* 1389. before *Belknap*, *Skipwith*, and others *apud Lincoln* *septem falsarii monetae convicti*, qui simul tracti fuerunt & suspensi, & quidam vicarius de *Wintringham* obmutescens adjudicatus est ad *pœnam mutorum*; but at this day the law is taken otherwise, and that standing mute amounts to a conviction of the crime.

And in short at this day in all cases of treason for counterfeiting the coin of this kingdom, or of any the dominions thereof, or of foreign coin made current by proclamation, or for washing, clipping, scaling, impairing, or diminishing the same, tho most of these are made treason by new acts of parliament, as 1 *Mar.* cap. 6. 5 *Eliz.* cap. 11. 18 *Eliz.* cap. 1. yet the judgment is only for a man to be drawn and hanged, for a woman to be burned, and so (as I said) it was solemnly resolved.

And the reason is, because tho most of these be new treasons made by act of parliament, yet they are all in their matter concerning money, wherein the judgment at common law was, as in case of petit treason; and that judgment was not altered by 25 E. 3. in case of counterfeiting, which is the highest offense concerning money, and therefore is not to be exceeded by the intent of those statutes, which brought lesser offenses concerning money, as clipping, into the same

(o) For clergy was antiently denied only in such treasons, as were immediately against the king's person, and therefore Co. P. C. p. 16. clergy was allowed in the case of counterfeiting the great seal. See also the case of *Bardon*, (P. 18. E. 2. B. R. Rot. 25. Rex. South' ton) who was admitted to his clergy on being convicted of felony and *fæderance in artis*, p. 185 & 186.
(p) 2 Co. Luf. 277.

rank of offense with counterfeiting, for they are all offenses *in pari materia*, and so shall have a parity of judgment.

See the Stat. 12. Geo. 3. ch. 20. concerning standing mute and refusing to plead.
4 Blackf. Com. ch. vi. page 89.

C H A P. XX.

[225]

Concerning treason in bringing in false money.

THE next point of treason is, if any man bring in false money into this realm counterfeit to the money of *England*, as the money called *Lufborough*, or other like to the said money of *England*, knowing the money to be false, to merchandize or make payment in deceit of our lord the king and of his people.

Touching this point of treason these things are observable.

I. That the money in this case must be imported from a foreign nation, for here, it is not the counterfeiting, that is the treason, but the importing : and yet it seems by the general words of the statute of 35 H. 8. cap. 2. the counterfeiting itself, tho out of the kingdom, may be tried in the king's bench, or before special commissioners, as well as any other treason.

But at common law the counterfeiting beyond the sea seems not to have been such a treason as could be tried here, as treason in adhering to the king's enemies might have been, and therefore the importing was made treason by this act.

Altho *Ireland* be within the statute of 35 H. 8. cap. 2. for trial of treason in compassing the king's death or levying of war, as is before observed, and therefore as to that purpose out of the realm of *England*, yet it hath been held upon the obscure book of 3 H. 7. 10. that an importation of counterfeit coin from thence into *England* is not treason here within that statute, principally because the counterfeiting itself is punishable by the statute of 25 E. 3. which is of force in *Ireland*. Co. P. C. p. 18. And the like reason holds for the *Isle of Man*. Before this statute there was some difficulty what this crime should be.

In the time of king *Edward I.* there were three great inconveniences touching coin imported from foreign parts, sometimes they imported true coin of *England*, but such as was clipped, sometimes

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they imported counterfeit coin like to the coin of *England*, but of a base alloy ; and most times they imported foreign coin, which yet passed between merchants, and filled the kingdom with bad money to the detriment of trade and the king's coinage.

And to remedy these inconveniences were those three ordinances made, called *Statutum de monetâ magnum, de monetâ parvum, & Articuli de monetâ* ; by which, searches were ordained of all coin imported, that if any clipt money or any foreign money, other than of *England, Ireland, or Scotland*, were taken, it should be pierced and redelivered to the owner, if it were false it should be detained, and the bodies of such as had false or clipt money to be attached (*a*), and if suspicious, detained till he produce his warrant ; that money be received by weight ; and by the second, *viz. Statutum de monetâ parvum*, that if any merchant brought in clipt or counterfeit money, for the first offence he should lose the money, for the second he should lose his money and goods, and for the third *de corporibus suis & de omnibus bonis & cattallis suis nobis totaliter incurritur* ; that if they were not merchants, they should pierce the clipt and counterfeit money and send it to the exchange, otherwise in whose hands soever such money should be found, it should be forfeited to the king : and by *articuli de monetâ* the several faulty coins, foreign and others, that had obtained in the kingdom by common use are described and decried.

By the statute of 9 E. 3. cap. 2. Item, " That no false money or " counterfeit *Sterling* be brought into this realm or elsewhere within " our power upon forfeiture of such money."

[227] By an act or rather an advice, *Rot. Parl. 17 E. 3. n. 15.*
qe nul soit si hardy de porter fausse & malveis monsie en roialme sur peyn de forfeiture de vie & membre.

Rot. Parl. 20 E. 3. n. 15. A complaint of importation of false money, especially the false money called *Lusheburnes*, praying *de punir ceux, que sont trovez culpablez d'lapport, ou de le receoit de eux sachant le fauxisme, par judgment come faux monyers.*

Ro'. Quant a cest point de ceux, qe apportent la faux mony deins le realme, & qe le usent per voy de merchander ent sachiant, le roy voet, quils eient judgment de vie & de membre, come faux monyers, solone les leys & customes de realme; but this was never drawn up into an act, yet *Rot. Parl. 21 E. 3 n. 19.* the commons desire the penalty may

(a) See an ordinance to this purpose in the reign of king *John Wlk. Leg. Anglorum. p. 359.*

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stand according as was ordained in the last parliament, and that it extend as well to the time past as to come, & ge nul chartres de pardon soient grant de dit fauxime & treason : they were answered, that the justices should be assigned to enquire of the time past and to come after this act, and to do right, and that pardons be not granted *cy legerment*.

By which it appears, that it was never settled to be treason till 20 E. 3. and even from that time there was but a faint proceeding upon that offense.

But this statute of 25 E. 3. was that, which made the final settlement in this point.

But this makes only the apporters themselves; their aiders, abettors, and assistants, traitors, not those, that receive it at the second hand ; and this stands with reason and is consonant to the statute of moneta before cited, which rendered the merchants offense punishable at the third time with death, but subjected others only to loss of the money, if not pierced and carried to the exchange.

II. That it be counterfeit after the similitude of the money of England, otherwise it is not treason : the bringing in of money counterfeit after the similitude of foreign coin made current here by proclamation is not treason within this act ; but by the statute of 1 & 2 Ph. & Mar. cap. 11. it is enacted, " That if any person after

" Jan. 20 next shall bring from the parts beyond the sea [228]
" into this realm or into any of the dominions of the same
" any false and counterfeit coin of money being current within this
" realm as aforesaid, viz. by the sufferance and consent of the king
" and queen,) (which extends to the successors) knowing the same coin
" or money to be false and counterfeit, to the intent to utter or
" make payment of the same, within this realm, or any of the do-
" minions of the same, by merchandizing or otherwise, that every
" such offender, their counsellors, procurers, aiders, and abettors
" shall be deemed traitors, and forfeit as in case of high treason."

And by the statute of 14 Eliz. cap. 3. forging of foreign coin not current by proclamation, as well without the realm as within, is made misprision of treason ; but that act extends only to the counterfeiting, whether within the realm or without, but not to the bare importing ; the instance that is here given is of Lushboroughs, which were a base counterfeit coin after the similitude of English coin.

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Other monies both before and after this statute there were, some counterfeit, some clipt, some of baser metal, some foreign, which had their several courses and periods in this realm: *Pollards* and *Crokards*, that obtained some time in *Edward I.* but were after decried by proclamation 24 E. I. *vide Dy.* 81. Other several base coins in the same king's time mentioned in the ordinance of *Articuli de monetâ, black money*, which had been formerly current here, recalled by the statute of 9 E. 3. *de monetâ; cap. 4. Sufkins, Dodkins,* and *Gally* half-pence recalled by the statute of 11 H. 4. *cap. 5. 3 H. 5. cap. 1. Scotch* money recalled by the statute of 3 H. 5. *cap. 1. Blanke*s recalled by the statute of 2 H. 6. *cap. 9.* and several penalties, some general, some of felony applied to them; but these were for the most part out of this statute, and obtained here by connivance, till recalled.

III. The next qualification of this offense is, that the bringer in, must know it.

IV. The next qualification is, that he must bring it to merchandize or make payment thereof in deceit of the king and his people.

[229] Counterfeiting of the king's coin without uttering of it is treason; clipping, washing, &c. by the statutes of 5 and 18 Eliz. is treason, but it must be for gain or profit, and here the importing is not treason, unless it be to merchandize or utter it.

And hereupon my lord Coke (*a*) concludes, that he must merchandize therewith, or make payment thereof; it is a favourable exposition, but the statute is not, that if he import and merchandize, but *pur merchandizer & payment faire*, if it were to that intent, the statute makes it treason.

And by the statute of 1 & 2 Ph. & Mar. *cap. 11.* touching importation of coin counterfeit of foreign money, it must be to the intent to utter and make payment of the same; and tho' the best trial of an intention is by the act intended when it is done, yet the intent in this case may be tried and found by circumstances of fact, by words, letters, and a thousand evidences besides the bare doing of the fact.

As in case of those many acts, that prohibit lading of wool, gold, silver, &c. with an intent to transport the same, whereby some are made felony, &c. the intent shall be tried in those cases (being

(a) *Co. P. C. p. 18,*

joined

joined with an act) by circumstances, that evidence the intent of that action, for the bare intentions cannot receive any trial, yet intentions joined with an overt-act, as here, importation, may be tried and discovered by circumstances.

So that it seems the very importing of counterfeit money *par merchantizer, &c.* to the intent to merchandize or make payment therewith, tho no such merchandize or payment be actually made, is treason by this statute, if the party importing know it to be such, and that as well his intent as his knowledge lies in averment and proof.

And thus far concerning treasons relating to money.

C H A P. XXI.

[230]

Concerning high treason in killing the chancellor, &c.

I COME shortly to treat of the last kind of high treason declared by this act.

Si home tuast chanceller, treasurer, ou justice nostre seigneur le roy del un banck ou del autre, justice in cyre, ou de assises, & touts autre justices assignes de oyer & terminer, esteant en lour place fesant lour office.

I. This statute extends only to the actual killing of some of these officers, and therefore a conspiring to kill any of these without actual killing of any of them is not treason; but if many conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all, that are abettors or counsellors to do the act, as is before instanced in levying of war, and therefore there is a particular act made 3 H. 7. cap. 14. that makes the conspiring the death of a privy counsellor to be felony (*a*).

If a man only strike or wound one of these officers, tho in the execution of his office, this is a great misprision, for which in some cases

(a) But this act extends only to such offenders, as are the king's sworn servants, whose names are entered in the chequer-roll of the king's household, and who is under the state of a lord; and according to lord Coke's opinion the conspiracy must be plotted to be done within the king's household. Co. P. C. p. 39. by this statute the offender was not deprived of the benefit of the clergy; but by 2 Ann. cap. 16. on oc-

asion of Robert Harley, Esq; (afterwards earl of Oxford) being stabbed by Anthony Guiseard, who was then under examination before a committee of privy council, it was enacted, " That whoever should unlawfully attempt to kill, or should unlawfully assault, strike or wound a privy counsellor in the execution of his office, shall suffer death as a felon without benefit of clergy."

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the offender shall lose his hand (*b*), as was once done in the case of my lord chief justice *Richardson* sitting as justice of *oyer and terminer*, but it is not treason within this act.

[231] II. This statute extends to no other officers but those above-named, and therefore not to the lord steward, constable, marshal, admiral, or lord of parliament, tho in the exercise of their offices; it may be murder, but not treason. *Co. P. C. p. 18.*

A justice of peace, tho there be in the end of his commission of the peace, *nec non ad diversa felonias, malfacta audiend' & terminand'*, is not a justice of *oyer and terminer* within this act, for the justices of *oyer and terminer* are intended such, as have their commission *ad audiend' & terminand'*, &c., as the principal designation of their office; and thus it is in divers statutes also, that speak generally of justices of *oyer and terminer* (*c*).

But a justice of peace may be also a justice of *oyer and terminer* by another commission, as many times they are, and then they are within this statute, when they are sitting by virtue of that commission.

The lord keeper, when there is a lord chancellor also, as there may be both at the same time, seems not to be within this law; but if there be no lord chancellor, then the lord keeper is within this act, for by the statute of 5 *Eliz. cap. 18.* their office is declared to be the same to all intents and purposes, as if the lord keeper were lord chancellor.

But the commissioners of the custody of the seal (*d*) or for the treasury are not lord chancellor or lord treasurer within this act, and therefore at such times as the treasury hath been in commission those commissioners have not the same power as the lord treasurer, as in cases of writs of error by the statute of 31 *E. 3. cap. 12.* (*e*) in the exchequer before the lord chancellor and treasurer, and so for the setting of the prices of wines by the statute of 7 *E. 6.* (*f*) neither do they sit as lord treasurer in the exchequer-chamber, as judges of equity.

[232] It extends not to the chancellor and under treasurer of the exchequer, nor to the chancellor of the county palatine of *Lancaster*, nor to the lord privy seal, for these are special officers and of a lower rank, than the lord chancellor or treasurer.

III. The third qualification of this treason is, that it must be *extant* in four places, *existant four offices*; wherever the seal is open, whether

(*b*) *3 Co. Inst. 140.*

(*c*) *9 Co. 118. b. Cro. Eliz. 87, 607.*

(*d*) But it should seem, that now they are within the act, since by *1 W. & M. Jeff. 1. cap. 21.* their office is declared to be the same, and they to have the same jurisdiction and privileges, as lord chancellor.

(*e*) See also *31 Eliz. cap. 1.*

(*f*) This power is given by *37. H. 8. cap. 23.* which statute was revived by the *5 & 6 Ed. 6. cap. 17.* but there is nothing of it in the *7 E. 6.*

in the court of chancery or in the chancellor's house, the chancellor or keeper there sealing writs is *seant en son place, seant son office.*

And the same law seems to be, if he be hearing of causes in his chamber, for tho' antiently the hearing of causes upon English bills was rare, yet use hath sufficiently obtained to give it the style of *seant son office.*

Quare, touching the lord treasurer's dispatching business in his house, whether this be *seant in son place*, but sitting in the court of exchequer, or exchequer-chamber, or in the star-chamber, when it stood, had been *seant in son place, &c.*

The place for the justices of the several courts are the courts themselves, where they usually or by adjournment sit for the dispatch of the business of their courts.

And so much shall suffice for this treason also.

⁷ Hawk. P. C. 41. 4 Black. Com. c. vi. p. 84.

CHAP. XXII.

[233]

Concerning principals and accessaries in treason.

BEFORE I leave the discourse concerning high treason it is necessary to consider, whether or how all are principals in high treason.

In cases of felony there are two sorts of principals, *viz.* principals in the first degree, that do the fact, be it in murder or any other felony, and principals in the second degree, that are present aiding and abetting the felony.

And regularly in felony there are two sorts of accessaries, 1. Accessaries before the fact, which are not present, but yet counselling, commanding, or abetting the felony, but in manslaughter no such accessaries can be before: and 2. Accessaries after, such as knowing a felony to be done by such a man do yet receive or maintain him, unless it be a wife receiving her husband (*a*); of this hereafter in its due place.

Now in treason thus far it is agreed of all hands, 1. That there are no accessaries *á parte ante*, but all such as counsel, conspire, aid, or abet the committing of any treason, whether present or absent, are

(a) *Vide supra*, p. 47

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all principals. 2. It is likewise agreed of all hands, than in all treasons, except that which concerns counterfeiting the great or privy seal, or money, whosoever knowingly receives, maintains, or comforts a traitor, is a principal in high treason. *Co. P. C.* 16, 138. and so it is there cited to be resolved in the case of *Abington*, who received *Garter*, that was one of the conspirators in the powder treason : that which hath occasioned the doubt hath been the resolution in *Conyer's* case, *Dy.* 296. who was indicted, that *proditorie receptasset, &c.* *Fairfax*, *scens ipsum diversas pecias monetas ad similitudinem monetae*

Angliae vocat shillings de falso metallo fabricasse; upon this [234] he and others were discharged, because it was misprision of treason only, and not treason ; but this opinion is contradicted by my lord *Coke*, *Pla. Cor.* p. 138. and yet it is said by the same author, *Peschæ 9 Jac.* 12 *Rep.* 81. the receiver of a counterfeiter of the seal or money is no traitor.

We will see therefore in what cases an act *ex post facto* will be, treason in relation to the aid of him, that committeth this or any other treason.

A man is imprisoned for treason, the gaoler voluntarily suffers him to escape, this is treason in the gaoler. *Stamf. Pl. Co.* 32.

If a person be arrested for treason, he that rescues him is guilty of treason.

And so if a man be imprisoned for treason, and another prisoner or any other person breaks the prison, and lets out the party imprisoned for treason, this is treason in the party that breaks the prison. *1 H. 6. 5. Stamf. Pl. Cor.* 32. nay, if a stranger breaks the prison and lets out one there imprisoned for treason ; this is held treason, tho he that breaks the prison knew not that any there was imprisoned for treason ; so resolved by ten judges, *P. 16. Car. Croke* 583. *Bentley's* case ; but my lord *Coke* holds that he must be knowing it. *Ca. Mag. Cart. super statutum de frangentibus prisonam* (b).

Rot. Parl. 2 H. 6. n. 18. in schedula. Mortimer was committed to the Tower of London for suspicion of treason ; and 23 Feb. 2 H. 6. was indicted, *quod per covinam, confederationem & assensum* Wilhelmi King, &c. *pro diversis denariorum summis eidem* Wilhelmo King *per prefatum Johannem Mortimer promissis, idem Johannes turrim praediæ falso & proditorie fregit* : the indictment was removed into parliament, and John Mortimer likewise brought into the par-

(b) *2 Ca. Inf. 590.*

liament ;

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Fragment: the commons desired the duke of Gloucester (then commissioned to hold the parliament) that the indictment might be affirmed, and that *John Mortimer de predictis proditionibus & felonii convictione*: thereupon the duke and lords at the request of the commons affirm the indictment by act of parliament, & quod predictus Johannes Mortimer de proditionibus & felonii predictione [235] convincatur, & quod trahatur per medium civitatis, & super furcas de Tyburne suspendatur, & ad terram projiciatur, & caput ejus amputetur, & interiora sua comburantur, & corpus ejus in quatuor partes dividatur, & caput ejus ponatur super portam ponitis London, &c. & quod bona & catalla, terras & tenementa sua, tam in dominico, quam in reversione domino regi forisfaciat.

So that it seems, tho' the statute of 25 E. 3. speaks not of these offenses, yet they are in a manner incidents, and virtually included within the original offense, and therefore these cases of voluntary permission to escape, rescue, breach of prison, translate the original offense upon him, that commits it by the common law; and these would be treasons as well in the case of counterfeiting of coin, as other treasons.

But herein these things are observable, 1. This judgment in *Mortimer's case* is not at all now in force, nor binding, for the statute of 1 Maria repeals not only enacted treasons, but declared treasons, that were not within 25 E. 3. and 2. That therefore at this day, if one be committed for suspicion of treason, and another break goal to let him out, yet unless the party imprisoned were really a traitor, this is no treason at this day. 3. But if he were really a traitor, then breaking of the prison to enlarge him is treason, and a treason of a greater guilt, than a knowing receiver, and then it is treason by virtue of the common law, for it is a kind of incident; the like of a receiver of a traitor, or a goaler that suffers him voluntarily to escape, those are incident treasons by the common law, and virtually included in the statute of 25 E. 3. as well as a receiver of a traitor knowingly.

The differences therefore seem to be these, which state and reconcile the whole matter.

First as for new treasons. If an act of parliament enact a new treason, and that the offender, his counsellors, abettors, and aiders thereunto shall suffer as traitors, this doth not make receivers or confabulators after the fact guilty of treason, for *expressum facit cessare tacitum*;

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[236] *tum*; such a clause we shall find in the statute 23 Eliz. cap. 2. for a new felony (*c*), 5 Eliz. cap. 1. in a case of a *præmunire* (*d*).

If an offense be made treason in the offender, his procurers, counsellors, abettors, consenters, (without the word *thereto*) yet it seems to me for the same reason it doth not make the knowing receivers traitors, unless the words *receivers* or *comforters* be also inserted: for the former words import an offense preceding or concomitant to the act of treason, but the latter words *receivers* and *comforters* are after the offense, and so of another nature: and this difference appears expressly by the statute of 13 Eliz. cap. 2. where *abettors*, *procurers*, and *counsellors* are made guilty of high treason; but *receivers* and *comforters* (*e*) after the fact are only within the statute of *præmunire*; the like in 27 Eliz. cap. 2. where the coming of a priest, &c. is *treason*, but his receiver, aider, or comforter is *felony*: so 5 & 6 E. 6. cap. 11. and 2 Eliz. cap. 5. the offenders, their counsellors, abettors and procurers, and all and every their aiders and comforters knowing the same extend to knowing receivers.

The word (*aid*) is of somewhat a more doubtful extent, yet we shall find in those statutes and some others the word *aid* to be applied to an aiding after the offense, and not in it or to it; but it seems to me, that when it is joined only with those that import a consent to the offense, (as *procurers*, *counsellors*, *aiders*, *abettors*, or *counsellors*, *consenters* and *aiders*) as in the statute of 5 Eliz. cap. 11. for clipping, 18 Eliz. cap. 1. for impairing 1 Mar. Jeff. 2. cap. 6. for counterfeiting foreign coin, it must be construed of those that are *aiders* in the offense, and not bare receivers of the person.

But in all new treasons, those that rescue him from prison, or suffer him voluntarily to escape being lawfully committed to his custody, tho these are not expressly contained in that new act of treason, yet they are traitors by a necessary construction of law upon the act [237] itself; but if the act be general, making a man a traitor for such an act without mentioning in what degree his aiders, or abettors, comforters, or receivers shall be, it seems probable, that the receiver, knowing it, is thereby virtually made also a traitor;

(c) The words of this statute are, *aiders, procurers, and abettors.*

(d) The words of this statute are more extensive, *viz. abettors, procurers, counsell-*

lors, aiders, assistants, and comforters.

(e) The words in this place of the statute are, *aiders, comforters, or maintaine-*

rs.

this.

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this, I say, seems probable, but most certainly procurers, consenters, and aiders to the fact are thereby traitors, tho not specially so enacted; this is agreed in *Conyer's case*, *Dy.* 296. *Co. P. C.* 16 & 138.

Secondly, As touching treasons within the act of 25 E. 3.

The procuring, counselling, consenting, or abetting such treasons, tho not specially expressed in that statute, is treason within that statute. *Co. P. C. cap. 64.* p. 138. and so is the receiving of a traitor, or a gaoler's voluntary permitting him to escape, if he were in truth a traitor.

In case of the knowingly receiving of a person guilty of counterfeiting of coin, or of the great seal, there is diversity of opinion, *M. 12 & 13 Eliz. Dy.* 296. and my lord *Coke* himself in his *12 Rep.* p. 81. 9 *Jac.* says, that it is not treason, and yet *Pla. Cor. cap. 64.* p. 138. he holds it treason, tho this latter opinion is the more probable, the former is more merciful.

But in all other treasons against the king within the statute of 25 E. 3. the receiver of a traitor knowingly makes the receiver a traitor: this was *Abington's case* for receiving *Garret* guilty of the powder treason, *Co. P. C.* p. 138.

Only this difference is to be observed, he, that being committed for treason breaks prison, may be indicted for breaking of prison before he be convict of the principal offense, for which he was committed, but not of treason, but it will be only felony by the statute *de frangentibus prisonam*, for this statute *de frangentibus prisonam* makes it not treason; and if it did, yet the statute of 25 E. 3. makes it no treason, because not within the same statute, and consequently *1 Mar. cap. 1.* exempts it from being treason; but he, that rescueth a person imprisoned for treason, or suffers him voluntarily to escape, shall not be arraigned for that offense, till the principal offender be convict of that offense: for if he be acquitted of the principal offense, the gaoler, that suffered the escape, and he that made the [238] rescue shall be discharged; and the like in felony. *Coke Mag.* *Car. super stat. de frangentibus prisonam*, p. 592. and the reason, is because tho rescuing a person charged with treason, or suffering him wilfully to escape be a great misdemeanor, yet it is not treason, unless in truth and reality he were a traitor, for a man may be arrested or imprisoned under a charge of treason, and yet be no traitor.

And

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And tho the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessary, yet thus much he partakes of an accessary, 1. That his indictment must be special of the receipt, and not generally, that he did the thing, which may be otherwise in case of one, that is a procurer, counsellor, or confederate; thus it was done in *Coxey's case*, *Dy.* 296. 2. That if he be indicted by a several indictment, he shall not be tried till the principal be convicted (*f*), upon the reason of the goaler and rescuer before given, for the principal may be acquitted, and then he is discharged of the crime of receipt of him. 3. If he be indicted specially of the receipt in the same indictment with the principal offender, as he may be, yet the jury must first be charged to inquire of the principal offender; and if they find him guilty, then to inquire of the receipt, and if the principal be not guilty, then to acquit both; and accordingly it was ruled in *Arden's case* (*g*).

For tho, in law, they be both principals in treason, and possibly process of utlary may go against him, that receives, at the same time as against him, that did the fact; and tho the principal appear, process may go on against the other (otherwise in the case of an accessary in felony, *Stamf. Pla. Cor.* 47.) yet in truth he is thus far an accessary, that he cannot be guilty, if the principal be innocent.

How far *Mortimer's case* agrees with law at this day, *videbimus infra, & vide supra.*

[239] That, which will not make an accessary to felony after the fact, will not make a man principal in treason; therefore sending of a letter for his deliverance, or speaking a good word for him, &c. will not be treason. *Stamf. Pl. Cor.* 41. b. how far charitable relief will do it, *vide infra super statutum 13 Eliz. cap. 1.*

Foster 213. 341. 347. 1. Hawk. P. C. ch. xvii. §. 39. & ch. xx. §. 4. Fost. 341.

(*f*) See *pofte Book II. cap. 28.* And therefore the conviction of lady *Alice Lyle*, *Mac. II.* was contrary both to law and treason) was not at that time convicted, nor indeed was there any proof that she at that time knew he had been in the rebellion. *State Tr. Vol. IV. p. 105.*

(*g*) *1 And. n. 154. p. 109.*

CHAP. XXIII.

Concerning forfeitures by treason

HAVING gone thro the several treasons declared by this statute, I shall now proceed to what follows in this statute, which is, 1. Touching forfeitures of high treason. 2. Touching declaring of treason by parliament, and under this head shall consider those several declarations and new enacted treasons since the statute of 25 E. 3. and how they stand at this day.

The forfeitures for treason are either goods or lands.

As to goods: the king's prerogative as to goods forfeit for treason is the same as to forfeitures for felony, only there seems to be some difference in relation to grants thereof. 22 *Aff.* 49. The king grants to the master of St. Leonard's *Omnia bona & catalla tenentidm suorum fugitivorum, & felonum qualitercumque damnatorum*. A tenant of the master's was convict and attaint for killing of the king's messenger, which at that time was held high treason; it was ruled, that the master shall not have the goods of this person by force of this general grant.

As to lands this statute of 25 E. 3. goes farther, *Et soit a entendus, qe less cases suisnosmes doit estre adjuge treason, qe se extend a nostre seigneur le roy & sa royal majesty, & de tel manners de treasons le forfeiture des eschetes appertenont a nostre seigneur le roy, ci bien de terres & tenements tonus des autres, come de lui mesme.*

I shall here examine, 1. Of what lands the king shall have [240] the eschete upon attainer of treason, and 2. In what manner or degree he shall have those eschetes. 3. Where a subject in point of privilege or franchise shall have these royal eschetes.

I. As to the first of these, what lands are forfeit to the king by attainer of treason, my lord Coke, *Pl. Cor.* p. 19. gives a full account of them, which I shall repeat with some additional observations: 1. At common law the lands entailed were forfeited for treason, because it was a fee-simple conditional; but by the statute *W. 2. de donis conditionalibus* the forfeiture of lands entailed, even in case of treason, was taken away, and the general words of this statute of 25 E. 3. doth not repeal the statute of *Wesm. 2.*

But.

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But some later statutes have given to the king the forfeiture for treason of lands entailed: the statute of 21 R. 2. cap. 3 did give the forfeiture of lands entailed to the king for the treasons therein mentioned; but that statute with the whole parliament of 21 R. 2. was repealed by the statute of 1 H. 4. cap. 3.

By the statute of 26 H. 8 cap. 13. *in fine* lands entailed are forfeited by attainder of treason, *viz.* " All such lands, tenements, and " hereditaments, which any such offender shall have of any estate " of inheritance in use or possession, by any right, title, or means, " within any of the king's dominions at the time of any such treason committed, or at any time after, saving to all persons, other " than the offenders, their heirs and successors, and such persons as " claim to any of their uses, all such right, title, interest, possession, &c. as they might have had if this act had not been " made."

And by the statute of 33 H. 8. cap. 20. (*a*) " That if any person " be attaint of high treason by the course of the common law such " attainder shall be of as good force, as if it had been by parliament; " and the king, his heirs and successors shall have as much benefit " by such attainder, as well of uses, rights, entries, conditions, as " possessions, reversions, remainders and all other things, and shall

[241] " be deemed in the actual and real possession of the lands, " tenements, hereditaments, uses, goods, chattles, and all " other things of the offender, which his highness ought to have, " if the attainder had been by authority of parliament, without any " office or inquisition to be found for the same, saving to all persons, (other than the offenders and their heirs and affigns, and " other persons claiming by, from or under them or to their uses " after the treason committed) all such right, title, use, possession, " entry, reversion, remainder, interest, condition, fees, offices, rents, " annuities, commons, leases, and all other commodities, and hereditaments whatsoever, which they should, might, or ought to have, " if this act had not been made."

And the statute of 5 & 6 Ed. 6. cap. 11. is to the same effect.

These statutes as to the forfeiture of lands entailed remain in force, and are not repealed by the statute of 1 Mer. and so it hath

(a) See the cause of making this act, 3. Co. L. &c. 10. &

.been

been often ruled, and particularly by all the judges in the lord *Sherfield's* case 21 *Jac de quo postea*.

And the reason is, because the statute of 1 *Mar. cap. 1.* enacting, that no treason shall be, but what was enacted by 25 *E. 3.* and that no pains of death, penalties or forfeitures shall ensue for doing any treason, other than be in the statute of 25 *E. 3.* these words *other than be mentioned in the statute of 25 E. 3.* refer to treasons, not to forfeitures or penalties; and therefore tho by the statutes of 26 and 33 *H. 8.* new penalties, *viz.* forfeitures of lands intailed, are introduced, this forfeiture is not repealed, but only new treasons not mentioned in 25 *E. 3.* so that at this day, if tenant in tail be attaint of treason, the estate-tail is forfeited, and yet this attainder works no corruption of blood as in relation to the heir in tail: *vide* the lord *Lumley's* case cited in *Dowty's* case, 3 *Co. Rep. 10. b.* Grand-father tenant in tail, father, and son, the father is attaint of treason and dies, the grandfather dies, the land shall descend to the grand-child, for the father could forfeit nothing, for he had nothing to forfeit; and the statute of 26 *H. 8.* that gives the forfeiture of tenant in tail, yet corrupts not the blood by the attainder of the father.

And therefore it is agreed in the principal case, that if [242] after 26 *H. 8.* and before 33 *H. 8.* which vests all in the king without office, if tenant in tail had been attainted of treason, and died in that interval, the land would have descended to his son till office found; but otherwise in case of tenant in fee-simple attainted and dying before office, the freehold is cast upon the king without office, because none could take it else,

2. The king at common law and by virtue of this statute was entitled to a right of entry, where the party was *in* merely by disseisin or abatement, but not to a right of entry, where the possessor was *in* by title; but at this day by virtue of the statute of 33 *H. 8.* above-mentioned the king is entitled to a right of entry in both cases, and that without office, but then there must be an inquisition or seizure to bring the king into the actual possession; and if he grant it over before such seizure, the grant must be special, not of the land simply, but of the right to the land, otherwise neither land nor the right of entry passeth; it is so adjudged in *Dowty's* case, 3 *Co. Rep. 10. b.*

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3. If a person committing treason hath at the time of the treason committed a bare right of action touching any lands, or a right to reverse a judgment given against him by writ of error, or a right to bring a formondon, or writ of entry, but hath no right of entry without such recovery in such action; this right neither at common law nor by the statute of 33 H. 8. is given to the king by the attainer of treason, 3 Co. Rep. 3. a. marquis of *Winchester*'s case, 3. Co. Rep. 10. b. *Dowly*'s case so adjudged; but yet there have been two great cases resolved, that tread hard upon the heels of this judgment.

H. 15 Eliz. Pl. Com. 552. b. *Walsingham*'s case: *Wyat* tenant in tail of the gift of king *Henry VII.* the reversion in the crown, made a feoffment in fee, and then was attaint of treason, and died leaving issue, tho the feoffor, against his own feoffment, could not claim any right at the time of the treason; yet it was adjudged, 1. That there remained in him such a right of the entail, as was forfeited to the king. 2. And that the king was in as of his [243] reversion, and should not be subject to leases duly made by *Wyat* before his attainer.

21 Jac. in Camera Scaccarii *Stone* and *Newman*'s case, it was adjudged in *B. R.* and affirmed in *Camera Scaccarii* by the greater number of justices. *Bigott* tenant in tail general makes a feoffment to the use of himself and his heirs; and before the statute of 26 or 27 H. 8. commits treason, and is attaint of treason, and dies leaving issue inheritable to the entail, then a special statute is made 31 H. 8. whereby he was to forfeit all estates and rights; yet it was adjudged, 1. That against his own feoffment the tenant in tail could have no right, and therefore if the case had stood barely so, the right of the entail could not have been forfeited by the attainer. 2. But when an estate returns to him, that is forfeited by the attainer, the king shall hold this estate discharged of the right of the old entail, and that right shall never revive to the issue. 3. That the retrospect of the king's title by the attainer shall over-reach and avoid the remitter, which was wrought in the issue before the king's actual seisin by the attainer or office thereupon.

But it is to be noted, that if the king makes a gift in tail, saving the reversion to himself, the attainer of treason of such tenant in tail shall not bar his issue, because the statute of 34 H. 8. cap. 20. enacts,

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enacts, " That the heir in tail in such case shall have the lands, any recovery, or any other thing or things hereafter to be had; done, or suffered by or against such tenant in tail to the contrary notwithstanding," which act coming after 26 H. 8. and 33 H. 8. that gave the forfeiture of lands entailed, is a repeal of those statutes as to this case, and a restitution of the statute *de donis conditionalibus* in this special case: and therefore, where in *Plowden's Commentaries* (*Walsingham's case*) *Wyat*, who was tenant in tail of the gift of the crown, the reversion in the crown, was attaint of treason 1 Mar. he had not forfeited his land by virtue of the statutes of 26 or 33 H. 8. if there had been no more in the case; but in that case he lost it, because by a special act of 1 & 2 Ph. & Mar. that attainder was confirmed, and farther it was enacted, " That he should forfeit all the lands, tenements, and hereditaments, whereof [244] he or any to his use was seized the day of the treason committed, saving the right of all persons other than the person attainted and his heirs, and all claiming under them after the treason committed;" and this act coming after 34 H. 8. cap. 20. repealed that act as to this case, as the act of 34 H. 8. repealed the acts of 26 and 33 H. 8. as to entails of the gift of the crown, where the reversion continues in the crown.

But since all these statutes it is enacted by the statute of 5 & 6 Ed. 6. cap. 11. " That every offender being lawfully convict of any manner of high treason according to the course and custom of the common law shall lose and forfeit to the king's highness, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in his own right, in use, or possession, within this realm of England, or elsewhere within the king's dominions at the time of such treason committed, or at any time after :" this act coming after 34 H. 8. makes lands of the gift of the king in tail subject to forfeiture for treasons, as well as other lands entail. 16 Eliz. Dy. 332. b.

4. At common law the king was not entitled to a condition, that was in the party attainted; but now by the express words of the statute of 33 H. 8. the king is in some cases entitled to a condition of re-entry belonging to the party attainted, viz. not to the land itself but to the benefit of that condition, which might reduce the land into the possession of the party attainted, if he had not been attainted,

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and now to the benefit of the king : but herein this difference is to be observed.

1. If the condition be such, as that the substance of the performance thereof is not bound up strictly to the person attaint, then such a condition is given to the crown, and he may perform it, as the party himself might have done in case the condition hath a continuance.

7 Co. Rep. 11. b. Englefield's case : Sir Francis Englefield conveyed [245] his lands to the use of himself for life, the remainder to his nephew and the heirs male of his body, &c. with a *proviso*, that in as much as he might turn prodigal, and therefore for a bridle to him, if Sir Francis by himself, or any other during his life, should deliver or offer to his nephew a ring of gold to the intent to make void the uses, then the uses should cease—Sir Francis is attaint of treason ; it was ruled, that the queen in the life-time of Sir Francis may by commission, &c. tender the ring and make void the uses, for it was not personally annexed to him, but might be performed by the queen.

This case was judged M. 33 & 34 Eliz. but it was not thought safe to rely upon this judgment ; but 35 Eliz. cap. 5. there was a special act of parliament reciting the attainder and the conveyance with the proviso : “ And it is declared and enacted, that the attainer be confirmed, and that the queen was lawfully entitled to take benefit and advantage of that proviso in the same form, as Sir Francis Englefield might have done, and that the said proviso or condition was well performed by the queen's commiffion.” But suppose Sir Francis had died before the queen had made the tender, then the condition, which was only limited to him during his life, had been determined, and the queen could not have tendered, for the attainder could not lengthen the condition longer than the first limitation ; but on the other side, if the condition be appropriated and applied to the person of the party attaint, then such condition is not given to the crown.

The duke of Norfolk's case 11 Eliz (b) cited in Englefield's case to be adjudged and then agreed by the court : the duke conveyed land to uses, provided that if he shall be minded to revoke, and shall signify his mind in writing under his proper hand and seal sub-

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scribed by three witnesses, that then the uses should be revoked; it was ruled, that this condition was not given to the crown by his attainer.

2. *Car. 1. B. R.* Sir *William Shelly* (*c*) made a feoffment to the use of himself for life, the remainder to his first, second, third, and other sons in tail, provided, that if Sir *William Shelly* at [246] any time during his life give or deliver, or lawfully tender to the feoffees or any of them, their heirs or affigns, a gold ring, or a pair of gloves of the price of twelve-pence *ipso Willielmo tunc declarante & expressante*, that the tender was to the intent to avoid the deed, that then it should be void, and the feoffees should stand seised to the use of Sir *William* and his heirs; and it was adjudged in the common pleas, that this condition was so personal, that it was not given to the king, but upon a writ of error in *B. R.* the court was divided; *Whitelock and Jones*, that it was given, *Croke and Doderidge*, that it was not given to the king, & sic stetit.

In the case of *Wheeler and Smith* (*d*), *Simon Mayne* being possessed of the rectory of *Haddenham* for sixty years, in 1643. assigned it over to trustees in trust for himself for life, and afterwards to divers other trusts for payment of debts and other things, provided nevertheless and upon condition, that if the said *Simon Mayne* shall at the time of his decease have issue of his body, that then and from thenceforth the trustees shall stand possessed for such person and persons, and such estate and estates, as *Simon Mayne* by his last will and testament shall limit and appoint, and for want of such limitation and appointment, in trust for such after-born child; provided also, that if the said *Simon Mayne* shall hereafter during his life be minded to make void these present indentures, or any use or trust therein, or to limit new uses, and the same his mind shall declare or signify under his hand and seal in the presence of two witnesses, then the uses shall cease, and then the trustees shall stand possessed to such uses, as he by such deed or writing, or by his last will and testament in writing shall limit and appoint. *Simon Mayne* was guilty of the execrable murder of the king, had issue a son, was attainted, and died without making any such will or revocation or declaration, and by act of parliament all the estates, which he had

(c) See this case by the name of *Warner*. (d) See this case reported 2 *KB.* 564, and *Hardwin* in *Latch* 25, 69, 102. *W.* 608, 616, 772. 1 *Med.* 16, 38.
Jones 134.

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or any in trust for him, and all rights, conditions, &c. were vested in the crown, who granted this rectory to the duke of York, and by [247] him the same was granted to Sir William Smyth: it was adjudged in the common pleas, and upon a writ of error affirmed in the king's bench, P. 23 Car. 2. that Sir William Smyth had no title to this rectory: 1. That this was a personal condition and not given to the king, *under his hand and under his proper hand*, being all one in sense and appropriate to his person. 2. That, if it were given, yet the same expiring by the death of Mayne could not be performed after his death by the king. 3. Admitting it might, yet nothing but the condition was in the king, and not the rectory itself, till the condition performed. 4. That consequently the rectory passed not to the duke of York, because the condition was not performed. 5. Neither the performance of the condition nor the benefit thereof passed to the duke by the general grant of the rectory, but it must have been specially granted, or otherwise nothing passed. 6. That here was no estate in trust for Simon Mayne longer than during his life, because the whole residue of the trust was out of him, and was not reducible back to him, but by a strict performance of the condition or power, which was strictly tied to the person of Simon Mayne, and determined by his death, and therefore not given to the crown; but if it had been given to the crown, and might by the crown be transferred to the patentee, yet it seems the patentee could not transfer or assign that condition over to another; but this last question was not moved, as I remember, for the resolution of the former points made an end of the case.

5. At common law the king by attainder of treason was not entitled to uses or trusts belonging to the party attainted: thus it is recited to be the law by the statute of 27 H. 8. cap. 10. and was one of the reasons of the making of that statute for transferring of uses into possession; and hence it was, that in some general acts touching treason, as that of 21 R. 2. cap. 3. and in most particular acts of attainder, that were made after that time, there was special provision made, that the parties attainted should forfeit all the lands, whereof they or any other to their use were seized, and in most of those acts provision was also made to save from forfeiture such lands, whereof

[248] the persons attainted were seized to the use of any other, may be seen in the acts of attainder: *vide Rot. Parl. 1 E. 4. n. 18. 3 E. 4. n. 28, &c.*

And

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And yet, altho the statute of 27 H. 8. cap. 10. had executed uses into possession, so that after that statute all uses were drowned in the land, yet there have succeeded certain equitable interests called trusts, which differ not in substance from uses; nay, by the very statute of 27 H. 8. cap. 10. they come under the same name, *vix. usses or trusts.*

And by the statute of 33 H. 8. cap. 20. there is a special clause, that the person attainted shall forfeit all uses, &c. and the saving is to all persons other than the person attainted, and his heirs, and all persons claiming to the use of them or any of them.

And what other uses there could be at the making of the statute of 33 H. 8. but only trusts, such as are now in practice and retained in chancery, I know not, and yet such hath been the opinion of men, or rather their necessity in respect of frequent emergencies in estates and their dispositions thereof, that these trusts since the statute have not only been kept from being executed by the statute of 27 H. 8. but have been held and used quite as other things different from uses, and from all those burdens, with which uses were incumbered by several acts of parliament made before 27 H. 8.

And therefore H. 55 Eliz. Croke, n. 2. B. R. Ridler and Punter (e), such a trust not withing the statute of 3 H. 7. cap. 4. or any other statute of that nature.

M. 16 Jac. B. R. Croke, n. 23. (f) the king made a lease for years to Sir John Duncombe of the provision of wines for the king, but in trust for the earl of Somerset, who was afterwards attainted of felony; by the opinion of all the judges the king shall have this trust, and so if a person outlawed have a bond made to another in trust for him, it shall be executed by an information in the exchequer-chamber or chancery; but it was agreed by them all, and so resolved in Abington's case, that a trust, if a freehold, was not forfeited by attainder of treason.

But how this resolution in Abington's case can stand with [249] the statute of 33. H. 8. I see not, for certainly the uses there mentioned could then be no other than trusts, and therefore the equity or the trust itself in cases of attainder of treason seems forfeited by the statute of 33 H. 8. upon an attainder of *cetty qe trust* of an inheritance, tho possibly the land itself be not in the king.

(e) Cro. Eliz. 291.

(f) Cro. Jac. 512. Hob. 214.

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But indeed, where the king or a common person is entitled to an eschete by an attainer of felony, there, by the attainer of *ceſtī q̄e trūſt in feeſimble* the land nor trust doth not come to the king or lord by eschete, for the eschete is only *ab defellū tenentis*, and in this case the king or lord hath his tenant, as before, namely the feoffee in trust, who is to be attendant for the services to the king or lord, and by the attainer of felony of the feoffee, the lord shall have his eschete of the lands discharged of the trust; and besides, an attainer of felony is not within the statute of 33 H. 8. cap. 20. and so it was resolved by all the court in the exchequer, M. 21 Car. 2. wherein the case was thus (*h*).

10 Martii 1 Car. 1, a long lease of the manor of *Bony Tracy* came to Sir *Ralph Freeman*.

4 Car. 1. The fee-simple thereof was conveyed to Sir *George Sands* and his heirs in trust for Sir *Ralph Freeman*.

July 1633, Sir *George* having issue two sons, *Freeman Sands* and *George Sands*, Sir *Ralph Freeman* devised part of the manor to *Freeman Sands* and his heirs, and other part thereof to *George* the son and his heirs, and devised all the rest of the manor to *Freeman Sands* and *George* his brother, and all such other sons as Sir *George* should have by *Jane* his wife, and their heirs, and made Sir *George Sands* and *Ralph Freeman* executors, and appointed them to convey the term according to these trusts.

Ralph Freeman the executor refused, Sir *George* took administration alone to him and his wife *cum testamento annexo*.

1635. *Freeman Sands* died without issue, *George* being his brother and heir.

[250] Afterwards Sir *George* by *Jane* his wife had issue another *Freeman Sands*, but no conveyance was executed of the term or inheritance.

1655. *Freeman Sands* murdered his brother *George*, who dying without issue all that right or trust, that was in *George* the brother, descended and survived to *Freeman*.

7 Aug. 1655. *Freeman* the son was attainted of felony.

23 Nov. 1655. Sir *George* takes administration to his son *George*. The land being held of the king, as of the manor of *East-Greenwich*, the king's attorney preferred an information against Sir *George*

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Sands in the exchequer-chamber to have a conveyance both of the term and inheritance to be executed by Sir *George Sands* unto the king, being the lord of whom the land was held; but it was *und voce* resolved, 1. That as to the inheritance, tho there were a trust for *George* the son, and that trust descended unto *Freeman* the murderer, as his brother and heir, and was in him at the time of the death of his brother and at his attainer, as to the greatest part of the lands, and as to the residue of the lands the trust was originally for *Freeman Sands*, yet in as much as Sir *George Sands* continued seized of the fee-simple, and so was tenant to the king, tho subject to a trust; yet the trust eschewed not to the crown, but Sir *George* held it discharged of the trust. 2. That the term for years was not extinguished in law by the accession thereof to Sir *George*, as executor or administrator, tho Sir *George* had the fee-simple, because it was *en autre droit*, that he had the term. 3. That if the term for years had been a term in gross in trust for the party attainted, then by the attainer of felony the king had been entitled thereunto, not in point of eschete, but by his prerogative, having *bona & catalla felonum*. 4. But this term being to attend the inheritance the trust thereof was not like the trust of a chattel in gross, but was to wait upon the inheritance (and otherwise it had been impossible for the greatest part to have descended from *George Sands* to his brother *Freeman Sands*, unless it waited upon the trust of the inheritance); therefore the inheritance remaining in Sir *George* now discharged of the trust by the attainer of *Freeman Sands* [251] the trust of the term shall also remain in him, for it is a kind of incident or appurtenant to the inheritance.

And in this case the case of Sir *Walter Raleigh* was cited, which was Mich. 7 Jac. in Camera Scaccarii. Sir *Walter Raleigh* being possessed of a long term for years of the manor of *Sherburn*, intending to obtain the inheritance assigned this term to his son an infant upon pretense for a trust for his son, but really in trust for himself.

Sir *Walter Raleigh* then purchased the inheritance and made a settlement upon his son, but the same was defective, whereby the fee-simple remained in Sir *Walter*.

1 Jac. Sir *Walter* was attainted of treason, and afterwards the king granted all the goods and chattles real and personal of Sir *Walter* to *Shelbury* and *Smith* in trust for Sir *Walter's* wife and children.

Sir

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Sir *Walter Raleigh* was executed, and upon an information in the exchequer, M. 7 Jac. it is declared and decreed, that the lease was in trust for Sir *Walter*, and therefore forfeited by his attainder, as well as if it had continued in him; and that it should be cancelled, and not incumber the reversion in fee-simple.

So that according to this resolution this trust for Sir *Walter* was not a chattel, for then it had passed to *Shelbury* and *Smith*; but it was a kind of appurtenant to the inheritance, and together with it was forfeited by the attainder, the conveyance of the inheritance being defective, and accordingly at this day it is held by those that derived under the patent of king *James*.

6. At common law the king by attainder of treason was not entitled to any chattels, that the party had *en autre droit*, as executor, or administrator, or in right of a corporation aggregate.

But the husband possessed of a term in right of his wife forfeits it by attainder of treason, felony, or out-lawry; but as to lands of inheritance, if the husband be seized in right of his wife, and is attainted of treason, the king hath the freehold during the coverture; [252] and so if tenant for life be attainted of treason, the king hath the freehold during the life of the party attainted; and so he had before the statute of 26 H. 8. by the attainder of tenant in tail.

Touching forfeitures for treason by a corporation sole, or aggregate, somewhat is observable.

At common law and still to this day in the case of a corporation aggregate, as dean and chapter, mayor and commonalty, where the possessions are in common in the aggregate corporation, nothing was or is forfeited by the attainder of the head of the corporation, as the dean, mayor, &c.

At common law a sole corporation, as an abbot, bishop, dean, prebendary, parson, vicar, by attainder of treason forfeited to the king the profits of their abbey, bishoprick, prebend, during their incumbency; but their successors were not bound by that forfeiture, for tho the profits as they arose belonged to their persons, yet the inheritance was in right of their church, and so not forfeited.

But by the general words of the statutes of 26 and 33 H. 8. and by the exclusive saving of the rights of others, *other than the successors of the persons attaint*, these sole corporations forfeited the inheritance, and their successors were bound by such attainder; for it is apparent that H. 8. had not only in prospect the dissolution of monasteries, but

but had a resolution to curb the clergy, who were too obsequious to the pope and his power.

And therefore there were several attainers of abbots of high treason, whereupon the king seized their possessions, as dissolved thereby, as appears by the statutes of 27 H. 8. cap. 28. and 31 H. 8. cap. 13. touching monasteries, tho the king rested not barely upon such attainers; but by the statutes of 27 and 31 H. 8. their possessions are settled in the crown by those acts, and with this agrees the book of Dy. 289.

And therefore we may observe in the statute of 1 Mar. 2 cap. 16. for the attainer of the archbishop of *Canterbury* a cautious proviso was added, that it should not prejudice his successors touching the possessions of his see; this was to avoid the question, that otherwise might have arisen upon the general words of the forfeitures thereby enacted.

But now by the act of 5 & 6 Ed. 6. cap. 11. this matter [253] seems to be settled, for whereas by the statute of 26 H. 8. cap. 12. a person attaint of treason is to forfeit all the lands, which he had by any right, title or means, saving the right of others, other than the heirs and successors of the person attaint, which confiscated the inheritance of sole corporations attaint of treason, the statute of 5 & 6 E. 6. cap. 11. enacts specially, that persons attaint of treason shall forfeit the lands, which they have of any state of inheritance in their own right, and saves the right of all persons, other than the persons attaint and *their heirs*, which restores and preserves the right of *successors*, as it was at common law.

7. By the common law all hereditaments, whether lying in tenure or not, as rents, advowsons, commons, corodies certain, are forfeited to the king by attainer of treason; but such inheritances, as lie purely in privity, appropriate to the person, are not forfeited neither at common law, nor by any special statute, as a foundership, or corody uncertain.

8. At the common law by attainer of felony or treason of the husband the wife lost her dower: by the statute of 1 E. 6. cap. 12. no attainer of treason or felony excludes her dower; but by the statute of 5 & 6 E. 6 c. 11. the husband attaint of treason the wife shall lose her dower; and so it stands at this day, except in treasons enacted by particular statutes, where dower is saved to the wife, notwithstanding the attainer of her husband of treason, as upon the statute

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statute of 5 Eliz. cap. 11. for clipping money, 18. Eliz. cap. 1. for impairing money, 5 Eliz. cap. 1. refusing the oath of supremacy the second time, and some others.

And thus far concerning the things forfeited by attainder of treason, now,

II. I shall consider in what kind or degree the king hath these forfeitures of lands.

1. Altho' these be called royal eschentes, yet the king is not *in*, purely, as by an eschete, for he hath those forfeitures *in jure coronæ* of whomsoever the lands be immediately held; yea, tho' they are held immediately of the king, he hath them not in point of eschete, but *jure coronæ* or *prerogativa regalis*.

[254] 47 E. 3. 21 b. A manor is held of the king as of his honor of *D.* and the manor eschentes for the felony of the tenant, it is now parcel of the honor, and therefore by the book if the king grant it out again generally, it shall be held of the honor, but if it eschete for treason, it is no parcel of the honor, and if it be granted out generally it shall be held *in capite*, 6 E. 3. 32. a. accordant adjudge: *vide* the case of *Saffron Walden*, *More's Rep.* n. 301. (i) & *ibidem* n. 405. the case of the borough of *Southwark* (k).

2. Where land comes to the crown by attainder of treason all mesne tenures of common persons are extinct; but if the king grants it out, he is *de jure* to revive the former tenure, for which a petition of right lies. 46. E. 3. 19. (l)

3. If tenant in tail of the gift of the king, the reversion in the king, makes a lease for years, and then is attainted of treason, the king shall avoid that lease, for the king is *in* of his reversion, tho' the tenant in tail have issue living: this hard case is so adjudged in *Commentaries Austin's case (m) in fine*, and yet if such tenant in tail had, after such lease, bargained and sold, or levied a fine to the king, he should be bound by such lease as long as there is issue. *H. 22 Jac. B. R. Croker and Kelsey (n)*, 1 *Rep. Alton Woods case (o)*.

III. The third thing I propounded was the consideration of the eschentes in case of treason to such as have royal franchises, or counties palatine, as *Durham*, &c.

(i) *Mo.* 159.

(k) *Mo.* 257.

(m) *Plowd.* 560. a.

(n) *Cro. Jac.* 688. 1 *R. A.* 343.

(l) I take it, this should be *H. 46 E. 3.*

(o) 1 *C. 40. b.*

Petition 19.

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1. At common law divers lords had by special grant or in right of their counties palatine royal franchises of the lands held within their franchises of persons attaint of treason against the king.

Such was the royal franchise of the manor of *Wreck in John Darcy's case*, 6 E. 3. 31. b.

It appears in the parliament-roll 9 E. 2. m. 8. that the bishop of *Durham* claimed among divers franchises between the waters of *Tyne* and *Tees*, and *Norhamshire* and *Bedlingtonshire* in the county of *Northumberland*, the forfeitures of war, namely the lands of those, who held lands within that precinct, who adhered to the [255] enemies of the king.

And after many debates in parliament 2 E. 3. that liberty was allowed him by the judgment of the king and his council in parliament.

Claus. 1 E. 3. part 1. m. 10. and p. 2. m. 20. the precedents of the allowance of that liberty being produced, *viz.* that *Anthony* bishop of *Durham* had the forfeiture of *Castrum Bernardi* by the forfeiture of *John de Balliol*, the manors of *Hert* and *Hertness* by the forfeiture of *Robert Bruce*, the manor of *Gretham*, that was *Peter of Monfort's*; and, upon the consideration of the several pleadings in those cases, *concordatum est per nos & totum concilium nostrum in ultimo parliamento, quod episcopus habeat suam libertatem de hujusmodi forisfacturis juxta tenorem & effectum chartæ proavi nostri, ideo vobis mandamus, (vis. the custos of these lands) quod de terris & tenementis infra libertatem episcopatus prædicti, & in prædictis locis de Norhamshire & Bedlingtonshire in manu nostrâ & in custodiâ nostrâ per forisfacturam guerra existentibus manus nostram amovere vos ulterius de eisdem non intromittatis, and the like particularly after *Claus. 1 E. 3. part 2. m 20* an amoveas manus for all the lands of *Guido de Bello Campo Comes Warwick*, qui de rege tenuit in capite infra libertatem episcopatus Dunelmensis, and likewise for the manors of *Gainsford*, *Hert*, and *Hertness* in the hands of *Roger de Clifford* seised for the forfeiture of war of *John de Balliol* and *Robert Bruce*; only the patentees not to be put out without an answer.*

So that it is apparent, that at common law the bishop of *Durham* had the royal forfeitures of war (which was treason) for such lands as were within his liberty, tho they were formerly held of the king immediately *in capite*, if they lay within the precinct of his county palatine; and tho by the statute of 7 E. 6. the said bishoprick was dissolved,

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dissolved, yet by the statute of 1 Mar. Parl. 2. cap. 3. that act is repealed and the bishoprick with its franchises revived.

2. Yet farther, tho this act of 25 E. 3. declares, that all such forfeitures belong to the king, yet this act did not derogate from the franchise of the bishop of *Durham* or others, that had that royal [256] liberty of forfeitures for treason, because it was in effect but a declaration of the common law, or at least an ascertaining of it without prejudice to those, that had these franchises of royal forfeitures, either by charter, or by reason of their county palatine by prescription; and this is agreed by all the judges in the case of the bishop of *Durham* P. 12 Eliz. Dy. 288. and accordingly Rot. Parl. 1 E. 4. n. 20. & sequentibus, where by act of parliament a great many noblemen, that were of the party of H. 6. were upon the coming of E. 4. to the crown attainted and their lands forfeited to the king; and such as were within the county palatine of *Lancaster* annexed to the duchy of *Lancaster*, and the rest lodged in the crown; yet there is a special provision and exception of the lands within the bishoprick of *Durham*, viz. between the waters of *Tyne* and *Teſe*, and in the places called *Norhamshire* and *Bedlingtonshire* within the county of *Northumberland*, in which liberty and place the bishop of *Durham* and his predecessors of time, whereof there is no memory, have had royal right and forfeiture of war in the right of the cathedral church of St. *Cuthbert* of *Durham*, as by concord in parliament in the time of the progenitors of our lord the king *Edward* IV. it hath been assented.

3. Altho by the statute of 26 H. 8. and 33 H. 8. before-mentioned it is enacted, that the king shall have the forfeiture of all lands, &c. of the persons attainted of treason, yet in as much as in those acts there is a faving of the rights of others, the forfeitures for all treasons, that were within the statute 25 E. 3. and consequently were treasons at common law, by tenant in fee-simple, are faved to the bishop of *Durham*, and those that have such royal franchises of forfeiture of treasons; for these stand as they did before, by the opinion of five judges against four. P. 12 Eliz. Dy. 289. in the bishop of *Durham*'s case.

4. But as to the forfeiture for new treasons enacted by any of those statutes the lords of franchises shall not have their franchise; this was agreed by all: but those new treasons that were enacted in the time of H. 8. or before, are all repealed by the statute of 1 Mar. cap. 1.

5. But

5. But as to treasons, that stood by the statute of 25 E. 3. and therefore not repealed by 1 Mar. cap. 1. yet as to the forfeitures of tenants in tail, or of lands in the right of churches or monasteries, the person that hath *jura regalia* shall not have them, because the king before the act of 26 H. 8. was not entitled to the forfeitures of those estates; and the statute of 26 H. 8. stands unrepealed as to the forfeitures for treasons within the statute of 25 E. 3. these are the points resolved in that case of 12 Eliz.

And therefore it is observable, that in the statutes of 5 Eliz. c. 11. whereby clipping is made treason, tho the forfeiture of lands is only during the offender's life, and no corruption of blood, nor loss of dower, yet there are special proviso's, that all persons, which have any lawful grant to hold and enjoy the forfeitures of lands, tenements, goods, or chattles of offenders, and men attaint of high treason within any manor, lordship, town, parish, hundred, or other precinct within the realm of *England* and *Wales* shall and may at all times have like liberty to take, seize, and enjoy all such forfeitures of lands, tenements, goods, and chattles, as shall come or grow within their liberties by force of the attainder of any person upon any offense made treason by this act, as they might have done by virtue of any grant to them heretofore made.

I do not find the like clause to my remembrance in any other acts of new treason either in that of 1 Mar. Jeff. 2. cap. 6. for counterfeiting the privy signet or sign manual, or in that of 1 & 2 Ph. & Mar. cap. 11. for importing foreign counterfeit coin made current by proclamation, or in that of 18 Eliz. cap. 1. concerning washing of coin, nor in any of those temporary acts made for the safeguard of the queen's person, &c. so that upon the reason of the resolution of 12 Eliz. the patentees of goods or lands of traitors by patents granted before those acts, and particularly the bishop of *Durham*, whose claim is by prescription, cannot have the goods or lands of persons attainted for those new treasons: *vide* 13 Eliz. cap. 16. a special provision in the act of attainder of the earl of *Westmoreland* and others for the rebellion in the *North*, that the queen shall have and hold against the bishop of *Durham* and his successors the [258] lands, tenements, goods and chattles of the persons attainted within the county palatine and franchise of the said bishop.

Nay, I cannot see how the bishop of *Durham* can either by his ancient charters or prescription claim the goods or lands of persons attaint

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attaint for bringing in counterfeit coin contrary to the statute of 25 E. 3. for it seems that *that* was not treason at common law, as may reasonably appear by what has been before said touching that subject.

² Hawk. P. C. ch. xlix. § 2.

See a learned treatise, intituled, *Considerations on the Law of Forfeitures for High Treason*; (supposed to be) written by the Hon. Cba. Yorke, sometime Attorney General to King George III. and afterwards Lord High Chancellor of Great Britain, *per totum. WILSON.*

CHAP. XXIV.

Concerning declaring of treasons by parliament, and those treasons that were enacted or declared by parliament between the 25 of E. 3. and the 1 Mar.

ALTHO the order of the statute leads us to consider of *petit treason* in the next place, yet because I intend to absolve the whole discourse of high treason and misprision of treason, before I descend to crimes of an inferior nature, I shall proceed to a full consideration of the whole matter specially relating to high treason, and so far as the same is not common to other capital offenses: the statute therefore proceeds, “ And because many other like cases of treason may happen “ in time to come, which a man cannot think nor declare at this “ present time, it is accorded, that if any other case supposed treason; “ which is not above specified, doth happen before any justice, the “ justice shall tarry without going to judgment of the treason, till the [259] “ cause be shewed and declared before the king and his “ parliament, whether it ought to be judged treason or other “ felony; and if *per casu* any man of this realm ride armed covertly “ or secretly with men of arms against any other to slay him or rob “ him, or take him or detain him, till he hath made fine or ransom “ to have his deliverance, it is not the mind of the king or his coun- “ cil, that in such case it shall be judged treason, but shall be judged “ felony or trespass according to the law of the land of old time used, “ and according as the case requireth, &c.”

This clause consists of two parts, the former, how treasons not specially declared by this statute shall for the future be settled. 2. It declareth, that a particular offense therein mentioned, that was in truth formerly held to be treason, shall not for the future be taken to be so.

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As to *the former* of these clauses touching the declaring of treasons not declared by this act, I shall pursue the history thereof at large in what follows, only at present I shall subjoin these few observations.

1. The great wisdom and care of the parliament to keep judges within the bounds and express limits of this act, and not to suffer them to run out upon their own opinions into constructive treasons, tho in cases, that seem to have a parity of reason (*like cases of treason*) but reserves them to the decision of parliament: this is a great security, as well as direction, to judges, and a great safeguard even to this sacred act itself.

And therefore, as before I observed in the chapter of levying of war, this clause of the statute leaves a weighty *memento* for judges to be careful, that they be not over hasty in letting *in* constructive or interpretative treasons, not within the letter of the law, at least in such new cases, as have not been formerly expressly resolved and settled by more than one precedent.

2. That the authoritative decision of these *casus omitti* is referred to the king and his parliament, *wiz.* the king and both his houses of parliament, and the most regular and ordinary way is to do it by a bill declaratively; and therefore altho we meet with some [260] declarations by the lords house alone in some particular cases, as in that of the earl of Northumberland, anno 5 H. 4. and that of Talbot 17 R. 2. tho they be decisions and judgments of great weight, yet they are not authoritative declarations to serve this act of 25 E. 3. but it must be by the king and both houses of parliament.

As to *the latter* of these, it has been formerly discussed in the second chapter.

This, at common law, was held treason, and the particular reason of the adding thereof in this place was, in effect, to reverse the judgment given in B. R. P. 21 E. 3. Rot. 23. in Sir John Gorbegge's case (a); and touching this whole matter of riding armed, &c. *vide quo dicta sunt supra cap. 14. p. 135. & seq.*

Only the printed statute varies from the parliament-roll of 25 E. 3. p. 2. n. 17. for whereas it is printed in the late statutes (*covertly or secretly*) the parliament roll is *chivach arme descoverte ou secretment*, and accordingly the old written manuscript statutes are written thus, *ebivach arme descoverte ou en privy en le realm*, &c. which misprinting possibly hath made some mistakes in judgments given of high treason,

(a) *Vide ante p. 80. & 183.*

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as if to ride privily and covertly upon such a private attempt were not treason ; but to ride discovert, openly, were treason, when in truth neither in one case or the other it is treason, neither at this day nor at common law, if it be only upon a partioular or private quarrel, as in the case of 20 E. 1. between the earls of Gloucester and Hereford (*b*) ; and this of Gérbegge, tho it were *more guerrino & vexillis explicatis*.

But now to resume what is before promised, *viz.* touching the first matter, namely treasons not declared by the statute of 25 E. 3. we shall find, that between *that* statute and 1 Mar. there were treasons enacted or declared of these kinds :

1. Such as were simply declarative treasons, or so many expositions of the statute of 25. E. 3.

2. There were new treasons, that were simply enacted, and not declared only that were perpetual in their institution, but repealed by the statute of 1 Marq.

[261] 3. There were new treasons, that seem only temporary or fitted to the reigns of those kings, in whose time they were made.

4. There were some treasons, that were perpetual, but more explicate declarations or rather expositions of the statute of 25 E. 3. which yet stand repealed by the statute of 1 Mar.

And here I must advise the reader to take notice of these cautions.

1. Because the hereafter mentioned statutes are many, and consisting of divers clauses, that he rely not barely upon the abstracts thereof here given, because possibly there may be mistakes or omissions in those abstracts, but peruse the statutes themselves in the books at large.

2. That tho generally it be a fair topical argument, that when offenses are made treasons by new and temporary acts, they were not treasons within the statute of 25. E. 3. for if they were, they needed not to have been enacted to be treason by new statutes, as introductory of new laws in such cases ; yet that doth not hold universally true, for some things are enacted to be treason by new, yea and temporary laws, which yet were treason by the statute of 25 E. 3. as will appear in the sequel.

And therefore the statutes of 1 & 2 Ph. & M. cap. 3. 1 E. 6. cap. 12. 23 Eliz. cap. 2. making several offenses felony have this

(*b*) *Supra* p. 135. *Rgl. plac. parl.* p. 770

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wary clause, the same not being treason within the statute of 25 E. 3.

And hence it was, that whereas by the statute of 13 Eliz. cap. 1. compassing the queen's death and declaring the same by writing or printing is enacted to be treason during the queen's life, but the delinquent is by that statute to be charged therewith within six months, and *Throckmorton* was generally indicted for compassing the queen's death, and the overt-act was by making a writing declaring convenient landing places for the *Spaniard* forces, and the naming of divers popish gentlemen in writing, who would be assistant to that design, and communicating it to the *Spanish* ambassador, and *Throckmorton* excepted to the proceeding, because not within six months according to the statute of 13 Eliz. that exception was overruled, because it was a charge of treason and an overt-act [262] within the statute of 25 E. 3. which hath no such restriction, and thereupon he was convict and executed. *Camd. Annals sub anno 1584. p. 293.* and the like was done upon the like exception in the case of the earl of *Arundel*; *quod vide Camd. Annals sub anno 1589. p. 426.*

3. But where an act of parliament made for the safety of the king or queen's person or government enacts any offense to be felony only, or a misdemeanor only punishable by fine and imprisonment, without that wary clause above-mentioned, it is a great evidence and presumption, that the same was not treason before, and a judgment of parliament in point, for it can never be thought, that the parliament would in such cases abate the extent of 25 E. 3. or make that less than treason, which was treason by that act.

I shall as near as I can pursue the order above-mentioned, but some intermixtures there will necessarily be of the many particular treasons enacted by some statutes, some of which were within the statute of 25 E. 3. and I shall follow those in every succeeding king's reign.

In the time of king *Edward III.* I find no declarations of treason after the statute of 25 E. 3.

Only I find somewhat like it in the attainder of *Thorp* chief justice of the king's bench for bribery (*c*) and other offenses, who was

(c) He was justice of assize in com' *Lis-* *exigent upon an indictment for felony, that
sas,* and took bribes of several to stay an *should have issued against them.*

thereupon sentenced to death, before special commissioners (*d*) assygned *ad judicandum secundum voluntatem regis*, in respect of the oath he had made to the king and broken, whereby he had bound himself to that forfeiture, *si ale encountre son serement*: it is true he had judgment, but there was no execution; this judgment and the whole proceeding is entered in patent-roll of 24 E. 3. part 3. m. 3. dorf. and was afterwards removed into the lords house in the parliament held in octabis purificationis 25 E. 3. which was a year before the parliament held Wednesday in the feast of St. Hillary 25 E. 3. wherein

[263] the declaration of treason was made; and in that parliament of octabis purificationis, n. 10. the judgment was affirmed good, *de puis qe se obligea mesme par son serement a tel pannance, sil fait al encountre, & connusseit, quil avoit receive douns countre, son dit serement*: but with this caution for the future to prevent such an arbitrary course of proceeding, *& sur ceo y fait accord par les grants de mesme le parlement, qe si nul tel case auigne defore an evant de nul tel, que nostre seigneur le roy prigne devers lui des grants, qe lui plerra, & par lour bone avyse face outre ce qe plesa a sa royal seignory (e)*; but this comes not to our purpose concerning treason.

As to the time of R. 2. it was a fruitful time for declaring and enhansing of treason in parliament. Rot. Parl. 3 R. 2. n. 18. pars 1. the case of Jean Imperiall (*f*) who was sent as agent from the duke and commonalty of Genoa, and coming hither by the king's safe-conduct was murdered: the inquisition before the coroner was brought into parliament, and in pursuance of this clause of 25 E. 3. it was declared by the king, lords, and commons, to be treason.

This declaration being by the king and both houses of parliament was a good declaration pursuant to the act of 25 E. 3. but is not of force at this day, 1. Because it was but a particular case, and extended not to any other case, as a binding law but only as a great authority. 2. Because it being not within the express provision of the statute of 25 E. 3. it stands wholly repealed as treason by the statutes of 1 E. 6. and 1 Maria.

(*d*) The earls of Arundel, Warwick, &c

(*e*) There is likewise a proviso added, that this should not be drawn into precedent sed solennmodo servari oot, qui praedicu-

tum sacramentum fecerunt & frigerant, &

babent leges Anglie regales ac custodiendae.

(*f*) C. P. C. p. 8. vide supra p. 8g.

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Rot. Parl. 1 R. 2. n. 38. the judgment against *Gomeney* and *Weston* for betraying the king's castles in *France* mentioned before cap. 15. p. 168. where *Weston* had judgment to be drawn and hanged; this judgment was given by the lords at the petition of the commons in parliament, but makes not much in the point of declaration of treason, because, 1. If done, as is supposed, by treachery and bribery, it was an adherence to the king's enemies. 2. Being a declaration or judgment only by the lords, and not formally by the king, lords and commons, it is not such a declaration of treason, [264] as the act of 25 E. 3. requires in cases of treason not thereby declared.

Rot. Parl. 11 R. 2. pars 2. per totum, the great appeal in parliament by the duke of *Gloucester* and others against the archbishop of *York*, duke of *Ireland*, *Trefilian*, *Uffe*, *Blake*, *Holt*, and others containing divers articles, which surely were not treason within the statute of 25 E. 3. yet had judgment of high treason given against them by the lords in parliament (g).

Upon the impeachment of the commons against *Simon Burle*, *Beauchamp*, and others, many of them had likewise judgment of high treason given against them by the lords in parliament (*).

Altho the king did in some kind outwardly agree to these judgments, and the commons were active in it, and *Rot. Parl. 11 R. 2. pars 1. n. 50.* public thanks were given to the king by the lords and commons in full parliament, *de ceo, qil lour avoit fait cy plein justice*, yet this was no declaration of parliament of treason pursuant to the statute of 25 E. 3. because the king and commons did not consent *per modum legis declarative*, for the judgment was only the lords. 2. Because it was but a particular judgment in a particular case, which was not conclusive, when the like cases came before judges.

This parliament of 11 R. 2. was repealed by the parliament of 21 R. 2. and that of 21 R. 2. also repealed, and the parliament of 11 R. 2. enacted to be holden according to the purport and effect of the same by the statutes of 1 H. 4. cap. 3 & 4. but this did not alter the statute of 11 R. 2. and make those judgments, which were given by the lords in 11 R. 2. of any other value than they were and consequently amounted not to any declaration by parliament, that these which the lords adjudged treasons in 11 R. 2. were or

(g) See *StateTr. Vol. I. p. 1.*

(* *Ibid. p. 15.*

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ought to be so held; and if any such construction might be made upon the confirmation of 1 H. 4. cap. 4. yet the same was repealed by the statute of 1 H. 4. cap. 10. in the same parliament; and if not, yet certainly 1 E. 6. and 1 Mar. have wholly taken away the force of those declarations, as shall be shewed.

[265] *Rot. Parl. 17 R. 2. n. 20. Talbot's case*, in conspiring the destruction of the dukes of Aquitain and Gloucester the king's uncles, and other great men, *Et sur ce firent divers gents lever armes & arrayes a faire guerre en assemblies & congregations in tres grand & horrible nombre*: this was declared treason by the lords in parliament, and a proclamation issued to render himself, or otherwise to be attainted of treason: how far this was treason or not within the statute of 25 E. 3. hath been before considered, but certainly, if it were no treason declared by the particular purviews of 25 E. 3. it is no such authoritative declaration of treason in parliament, as this act requires in treasons not declared; and if it were such an authoritative declaration, it binds not now as such, because all treasons are reduced to those expressed in the statute of 25 E. 3. by the statutes of 1 H. 4. cap. 10. 1 E. 6. cap. 12. 1 Mar. cap. 1. and treasons declared, as well as new treasons enacted, are by these statutes set aside, farther than the very declaration of 25 E. 3. extends.

Rot. Parl. 21 R. 2. quod vide inter statuta 21 R. 2. cap. 2, 3, 4, 12. some new statutes of treason were enacted, others were declared; by cap. 2. it is enacted, that the procurers of any new commission like that, (for the obtaining of which the archbishop of Canterbury, &c. were in that parliament attainted) being convict in parliament should be guilty of high treason: again, cap. 3. If any be convict in parliament of the compassing of the king's death, or to depose him, or to render up his homage to him, or of raising war against the king; and cap. 4. The procurers or counsellors to repeal the judgments given in that parliament, if convict in parliament, are guilty of high treason: other treasons were declared, as namely those nine rank answers to the king's questions, which are all recited and affirmed, and adjudged good and sufficient by the 12th chapter of that parliament; other points were judged, as namely, that the procuring of the commission for regulating the miscarriages in government anno 7 R. 2. and the execution thereof by the archbishop of Canterbury and others was high treason,

And

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And tho it is true, that some of the points enacted to be treason by the 3d chapter were in truth treasons by the statute of 25 E. 3. if here were an overt-act, namely compassing the death or deposing the king, or levying war, yet these statutes and these declarations by the parliament of 21 R. 2. are wholly set aside; and the statute of 25 E. 3 governs the whole matter of high treason, notwithstanding any of the extensions, enactings, or declarations of the parliament of 21 R. 2. or any of the judges therein-mentioned, *viz.* *Belknap*, *Trefilian*, *Holt*, *Fulthorp*, *Burgly*, *Thirlinge*, *Bikhill*, and *Clepton*, for the parliament of 21 R. 2. is wholly repealed by 1. H. 4. cap. 3 & 4. and the parliament of 11 R. 2. wherein *Belknap* and *Trefilian* were judged traitors for delivering those extravagant opinions (*h*) is revived and affirmed; and also by the statutes of 1 E. 6. and 1 Mar. the treasons enacted or newly declared by the parliaments of 11 & 21 R. 2. are repealed.

And tho those opinions of the judges *Trefilian*, *Thirlinge* and the rest had the countenance of the parliament of 21 R. 2. yet they had the discountenance of the parliament of 11 R. 2. and 1 H. 4. which repealed the parliament of 21 R. 2. and stand at this day unrepealed in their full strength, excepting only such treasons as were newly made, or newly declared by those parliaments: tho the statutes of 1 E. 6. and 1 Mar. have taken away those treasons, which either the statute of 11 R. 2. or 1 H. 4. had introduced more than were in the statute of 25 E. 3. yet it hath not taken away the efficacy of the parliaments of 11 R. 2. and 3 H. 4. as to their declarations, that the extrajudicial opinions of those judges were false and erroneous; but in that respect the parliaments of 1 H. 4. and 11 R. 2. are of force, as to the damning of those extravagant and unwarrentable opinions and declarations.

I come now to the time of *Henry IV.* wherein I find little: *in anno primo* in parliament inter *Placita Coronae*, *John Hall* was convicted before the lords in parliament of the murder of the duke of *Gloucester*, and judgment given by the lords *per assent du roy*, that altho it were only murder, yet the offender should have the judgment of high treason, *viz.*, to be drawn, hanged, disembowelled, [267] his bowels burnt, his head cut off, and quartered, and his head sent to *Calice*, where the murder was committed, which was

(*h*) *Co. P. C. p. 22.*

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executed by the marshal accordingly : this was no declaration of treason, but a transcendent punishment of the murder of so eminent a person.

1 *H. 4. cap. 10.* " It is accorded, that in no time to come any treason be judged otherwise than it was ordained by the statute of king *Edward III.*" This at once swept away all the extravagant treasons introduced in the time of *R. 2.* either in over much favour of popularity, or over much flattery to prerogative, for they were of both sorts.

Rot. Parl. 5 H. 4. n. 12. There is a declaration of an acquittal of the earl of *Northumberland* from treason ; *quod vide antea cap. 14. p. 136.* but I find no declaration nor act of new treason, in the time of *H. 4.* he was as good as his promise by the act of 1 *H. 4. cap. 10.* for he contented himself with the declaration made by 25 *E. 3.*

In the time of *H. 5.*

By the statute of 2 *H. 5. cap. 6.* " It is ordained and declared that manslaughter, robbery, spoiling, breaking of truce, and safe-conducts, and voluntary receipt, abetment, procurement, concealing, hiring, sustaining, and maintaining of such persons to be done in time to come by any of the king's subjects within *England*, *Ireland*, or *Wales*, or upon the main sea shall be judged and determined treason done against the king's crown and dignity ; and the conservator of the truce to have power by the king's commission and by the commission of the admiral to inquire thereof :" But this statute as to treason is particularly repealed by the statute of 20 *H. 6. cap. 11.* but whether the general statutes of 1 *E. 6. cap. 12. 1 Mar. cap. 1.* had repealed it as to treasons done upon the sea may be a question, because it hath been ruled, that those statutes extend not as to trials of treason done upon the sea by the statute of 28 *H. 8. cap. 15. de quo infrā.*

The statute of 3 *H. 5. cap. 6 & 7.* it is true, is a declarative law, that clipping, washing and filing the king's coin is treason within the statute of 25 *E. 3.* and judges of assize and justices of [268] peace have cognisance thereof ; but even this declarative law is repealed by the statute of 1 *Mar.* as it is declared in the statute of 5 *Eliz. de quo antea.*

As to the judgment of treason given in Sir *John Oldcastle's case Rot. Parl. 5 H. 5. par. 1. n. 11.* tho the judgment be given in parliament, yet it is barely upon the account of compassing the king's death,

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death, and of levying of war, which was expressly within the statute of 25. E. 3. as appears before, cap. 14. p. 142.

Touching the times of H. 6.

Rot. Parl. 2 H. 6. n. 18. It appears, that *John Mortimer* was committed for suspicion of treason against H. 5. and 23 Feb. 2 H. 6. brake prison, and escaped, for which he was indicted 25 Feb. 2 H. 6. at *Guildhall, London*, before commissioners of eyer and terminer setting forth the matter, and that *prisonam preditam falso & voluntariis fregit*; the record by the king's command was sent into parliament, and by the king's commissioner *ad tenendum parliamen-* *tum*, and the lords at the request of the commons, it was affirmed a good indictment, and *Mortimer* had judgment to be drawn, hanged, and quartered, and his lands and goods forfeited to the king by the judgment of the lieutenant, lords, and commons, by an act made then for that purpose.

This it is true was an authoritative declaration of treason in this particular case pursuant to the clause of the statute of 25 E. 3.

But it rested not here, for in the same parliament, n. 60. a general statute passed, " Que si aucun person soit indite, appelle ou prise " par suspicion de grand treason and pur cest cause soit commis " & detenus in prison & escape volontierement hors du dit prison, " que tiel escape soit adjuge & declare treason, si tiel person ent " soit duement attaint felon la ley de terre. Et eient les seigneurs de " fee en tiel cas les eschetes & forfeitures de terres & tenements de " eux tenus par tiel persons issint attaints, come de ceux, que sont " attaints de petit treason; Et teigne cest estatute lieu & effect del " 20 'our de Octobre darrein passe tanque al prochein parliament.

" Ro'. Soit fait, come est desyre par la petition.

This parliament began 20 Oct. 2. H. 6.

The things observable hereupon are these, 1. That to [269] rescue a person, that is a traitor, out of prison was treason at common law, and so continues at this day within the statute of 25 E. 3. 2 Co. Inst. p. 589. and 1 H. 6. 5. b. 2. But if a man committed for treason breaks prison and escapes, this is not treason at common law. 3. Tho it be felony by the statute *de frangentibus prisonam*, yet it is not made treason by that statute. 4. But if it were treason by that statute, yet it is corrected and made not treason by the statute of 25 E. 3. and 1 H. 4. and therefore in this case it was made treason merely by the judgment of parliament, and statute of 2 H. 6. was but temporary and expired by the next parliament.

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parliament. 5. That the judgment itself in *Mortimer's case*, tho an authoritative declaration, was not at all binding in other cases for two reasons, 1. Because it is checked and controled as to any such effect by the general act of parliament of 2 H. 6. which was to continue only to the next parliament; and 2. Because it was but a particular judgment of parliament in that particular case, to which it was particularly applied.

But howsoever, that question is now put out of question by the general act of 1 Mar. cap. 1. which enervates the force of this judgment and declaration; for 1 Mar. repeals declarative laws of treasons as well as enacting laws, and leaves the judges to judge strictly according to the statute of 25 E. 3. as if no such judgment had been given in parliament. 2 Co. Instit. p. 589. and therefore it seems strange to me, that the judges took any notice of 2 H. 6. in *Bensley's case* to ground any opinion on (i).

And therefore, altho in the late act of attainder of the earl of *Strafford*, there was a proviso added, that it should not be construed, that the treasons therein charged should be a rule for judges to proceed

[270] by, in other cases, it seems a cautious but needless proviso, because it was a particular judgment, that did not *egredi personam*, and no general declarative law to serve the statute of 25 E. 3. For there may be collateral reasons not only in policy, but in justice sometimes for a parliament to vary the punishment of crimes, in substance the same, when differenced by circumstances, in several persons.

8 H. 6. cap. 6. Burning of houses maliciously or wickedly to extort sums of money from those, whom the malefactors spare, is made high treason with a retrospect to the first year of the king's reign, saving to the lords their liberties, as in case of felony.

Two things are observable upon this act, 1. That had it not been specially provided against, the lords had lost their eschetes by making it treason. 2. That this act, tho perpetual in its constitution, yet was repealed by 1 Mar. cap. 1. and after that repeal it remained felony, as it was before, and so continues to this day.

(i) Cro. Car. 583. Jones 455. It was the case in 1 H. 6. s. 6. and not the statute of 2 H. 6. on which the judges grounded their opinion, altho as that opinion is express in Cro. Car. 583. and Kel. 77. vis. that the breaking of a prison, wherein traitors be,

is high treason, tho the parties did not know, that there were traitors there, is not warranted by that case, which is of one, who brake prison, knowing certain persons to be prisoners in the said prison for treason.

Rot. Parl. 11 H. 6. n. 43. A petition that *John Carpenter*, who had committed a barbarous murder upon his wife, for which he was outlawed and in prison in the king's bench, might for example's sake by authority of parliament be judged a traitor, and that the judges might give judgment against him to be drawn and hanged, saving to the lords their escheates. *Ro'. Pur ceo, quil semble encouentre le liberty de saint eglis le roy se avisera.*

20 H. 6. cap. 3. The coming of people out of *Wales* or the marches of the same into the counties adjacent, and taking and driving away cattle, and their abettors and receivers knowing thereof, is made treason against the king, saving to the lords marchers, of whom the offenders, receivers, or abettors held their lands, the forfeiture thereof and of their goods and chattles, when attainted; this act was to continue for six years: *nota*, the lords had lost their escheates and forfeiture of the offenders goods, if it had not been specially provided for, because made treason and a new treason, which was not before, for the lords marchers had not only forfeiture of goods of felons, but royal escheates and forfeiture of traitors goods for the most part; but that franchise, which was by prescription, could not extend to new treasons. [271]

I find nothing more relating to this matter in the time of *Henry VI.*

The impeachment of the duke of *Suffolk* by the commons for treasons and misdemeanors contained many articles of high treason within the statute of 25 E. 3. namely, *adhering to the king's enemies*; but the whole matter being at last left to the king, he was declared by the king clear of the treasons, and for the rest the king by a kind of composition ordered him to be banished for five years. *Rot. Parl. 28 H. 6 n. 18, 19, 20, &c.*

As to the reigns of *Edward IV.* and *Richard III.* tho in those great revolutions, that happened in the latter end of *Henry VI.* the beginning of *Edward IV.* the time of *Richard III.* there are many acts of attainder of treason of particular persons, that adhered to either party then contending for the crown, according as the success of war fell to one side or the other, as namely *Rot. Parl. 38 H. 6. n. 1.—36, &c.* many of the duke of *York*'s party were attainted of treason by act of parliament. *Rot. Parl. 1 E. 4. n. 6.—15, &c.* the numerous companies of the party of *Henry VI.* were attainted by parliament; the like was done in the short regress of *H. 6. 11 E. 4.* in a parliament held

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held in that short resumption of the crown by *Henry VI.* Again, the like was done in the parliament of 12 *E. 4.* upon the regrefs and re-expulsion of *Henry VI.* Again, *Rot. Parl. 1 R. 3.* divers persons of great quality, that opposed the pretensions of *Richard III.* were attainted by act of parliament; and the like was again done in the parliament of 1 *H. 7.* against the assistants of *Richard III.* Every new revolution occasioned the attainder by parliament of the most considerable of the adverse party; yet in all this time I find no general declaration or general enacting of new treasons by parliament.

I come to the time of *Henry VII.*

In this time I find but one new treason, namely the statute of 4 *H. 7. cap. 18.* whereby the counterfeiting of foreign coin made current in this realm is made high treason.

But this act was repealed by the statute of 1 *E. 6. cap. 12.* [272] and 1 *Mar. cap. 1.* and another act made to the same purpose in 1 *Mar. sess. 2. cap. 6.*

This wise prince duly considering the various revolutions, that had formerly happened in this kingdom touching the crown especially to the houses of *York* and *Lancaster*, and that every success of any party presently subjected all that opposed the conqueror, to the penalties of treason; and weighing that, altho by his marriage with the heir of the house of *York*, he had reasonably well secured his possession of the crown, yet otherwise his title, as in his own right, was not without some difficulties; he therefore made a law, not to enact treason, but to give some security against it, *viz.* 11 *H. 7. cap. 1.* “ That all persons, that attend upon the king and sovereign lord of this land for the time being in his person, and do him true and faithful service of alligance in the same, or be in other places by his commandment in the wars within this land or without, that for the said deed and true duty of alligance he or they shall be in no wise convict or attaint of high treason, nor of other offenses for that cause by act of parliament, or otherwise by any process of law, whereby he or any of them shall now forfeit life, lands, tenements, rents, possessions, hereditaments, goods, chattles, or any other thing, but be for that service utterly discharged of any vexation, trouble, or loss; and if any act or acts, or other process of law hereafter thereupon for the same happen to be made contrary to this ordinance, that then that act or acts or other process of law whatsoever they be, stand and be utterly void; provided always, that

"that no person or persons shall take any benefit or advantage by
"this act, which shall hereafter decline from his or their said allige-
"ance." Upon this act these things are observable.

1. That this act was not temporary or for the life of king *Henry VII.* but was perpetual, and extended to all succeeding kings and queens of this realm, for it is for attendants upon the king or sovereign lord of this land *for the time being.*

2. It is observable, that this act extendeth to a king *de facto*, tho not *de jure*, for in truth such was *Henry VII.* for [273] his wife was the right heir to the crown, and his regal power was principally by an act of parliament made 1 *H.* 7. before his intermarriage with his queen, tho both titles were derived to his descendants, *viz.* *Henry VIII.* and in default of issue, to his sister, from whom our present sovereign is descended: and this act, tho extended to his successors, which were kings *de jure*, as well as *de facto*, yet was made for the security of himself and his servants in the first place, which appeareth more fully also by the preamble.

3. That tho this act might secure the attendants on the king in his wars against impeachments in an ordinary course of law, and might, as to this purpose, exempt them from the danger of any treason by the statute of 25 *E.* 3. as adherers to the king's enemies, yet it was a vain provision against future acts of parliament, whose hands could not be bound by a former act from repealing it, or taking away the effect thereof in part or in all.

It is true, since that time this kingdom hath had no great experience of changes of this nature, nor need to make use of the advantage of this statute: it is true queen *Mary* began her reign 6 *July* 1553. she was crowned 6 *Oktob.* following, her first session of parliament began 5 *Oktob.* 1553. which was the day before her coronation, and the second session thereof was held by prorogation 24 *Oktob.* 1. *Mar.*

Upon that 6th of *July*, which was the day of king *Edward's* death, and before queen *Mary* was actually settled, the lady *Jane Gray* set up a title for herself, and continued in some kind of regal power, until the 1st of *Augyst* following, and during those twenty-four days the styles of deeds, statutes and other things (and possibly also processes) were made in her name, and a special act was made 1 *Mar.* sess. 2. cap. 4. to make them effectual, and to be pleadable in the style, name, and year of queen *Mary*; so that the lady *Jane* seemed an intruder for about twenty-four days; but the truth is, she was not so much

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much as an usurper, or a queen *de facto*: and these her assistants in
[274] that busines, viz. the archbishop of *Canterbury*, the duke of
Northumberland, the said lady *Jane* and divers others were
attainted before commissioners of *oyer and terminer*; and those at-
tainters confirmed by parliament 1 *Mar. Jeff. 2. cap. 16.* and note in
that act of attainder a special proviso, that the possessions of the arch-
bishoprick of *Canterbury* should not be forfeited by that attainer or
act of parliament; possibly they thought that the general words of
that act, or at least the statutes of 26 *H. 8.* and 33 *H. 8.* which gave
forfeitures for treason against successors, and were not repealed by
1 *Mar.* might otherwise have forfeited the lands of the archbishop-
rick by the attainer of the archbishop; but of this *supra cap. 23.*
p. 252.

4. But what was the meaning of the proviso in that act of 11 *H. 7.* “That no persons shall have the benefit of this act, who shall
“decline from his allegiance,” is dark and dubious.

But these questions never failed to be soon decided on the victor's
part by their parliaments, which were always obsequious enough in
these matters to the victor, and ready to pass acts of attainders for his
safety and their own, against which no security was, nor could be
given by this act of 11 *H. 7.*

I come now to the reign of *Henry VIII.* which was a reign,
wherein acts concerning treason were exceedingly multiplied, and
they are of three kinds: 1. Such acts, as constituted or declared
treason. 2. Such acts, as concerned the trial of treason. 3. Such
as concerned the punishment or forfeiture of treason.

By the statute of 22 *H. 8. cap. 9.* *Richard Rose* for wilful poisoning
of divers persons is by authority of parliament attainted of high trea-
son, and that he be boiled to death: and by authority of parliament
murder by wilful poisoning is made treason for the future, and the
offender to be boiled to death, and not to have benefit of the clergy:
justices of peace to have power to inquire of this offense, and also of
counterfeiting coin of any foreign kingdom, suffered to be current
here, the title of lords to escheate of the lands of offenders in poisoning
is saved to them (*k*).

[275] This treason is repealed by 1 *Mar. cap. 1.* and the same
remains felony as before.

(*k*) *C. P. C. p. 43.*

By

By 26 H. 8. cap. 13. " Maliciously to wish, will, or desire by words or writing, or by craft to imagine, invent, practise, or attempt any bodily harm to the king, queen, or their heirs apparent, to deprive them, or any of them of their dignity, title, or name, or slanderously, or maliciously to publish by express writing, or words, that the king, our sovereign lord is an *heretic, schismatic, tyrant, infidel, or usurper*, or rebelliously to detain any of his castles, &c. in this realm, or other his dominions, or rebelliously to detain or keep any of his ships, ammunition, or artillery, and do not humbly render the said castles, fortresses, ships, or artillery, to our sovereign lord, his heirs or successors, or such as shall be deputed by them, within six days after they be commanded thereunto by proclamation under the great seal, is enacted to be treason in the offenders, their aiders, counsellors, consenters and abettors: foreign treason to be tried in any county, where the king shall appoint by commission."

1. It should seem, that this act was intended to be perpetual, for in it and the subsequent clause of forfeitures it mentions the king, *his heirs and successors*. 2. Part of this seems to be treason by the statute of 25 E. 3. viz. the practising any bodily harm, if there be an overt act, and also the rebellious detaining of the king's castles after summons by proclamation; the rest are purely new treasons. 3. But whether it was temporary or perpetual, all treason resting singly, as enacted by authority of this act, is repealed by 1 E. 6. and 1 Mar. and yet the latter clause (⁽¹⁾) concerning forfeiture in relation to all treasons within 25. E. 3. stands unrepealed; *de quo vide supra & infra.*

By 27 H. 8. cap. 2. counterfeiting privy seal, privy signet, or sign manual is made treason, and the offenders, their counsellors, aiders, and abettors to suffer and forfeit, as in case of treason; this is repealed by 1 Mar. cap. 1. and then re-enacted by 1 Mar. cap. 6.

By 25. H. 8. cap. 22. the divorce between the king and queen *Catharine* is affirmed by parliament, and also the [276] marriage between him and *Anne Bullen*, and the crown with all dignities, honours, pre-eminent, prerogatives, authorities, and jurisdictions to the same annexed or belonging, is entailed after the king's

(1) By this latter clause the offender, &c. shall forfeit to the king, his heirs and successors all lands, tenements and hereditaments of any estate of inheritance in use or possession, by any right, title, or means.

death

death to the heirs of his body lawfully begotten, *viz.* to the first, second, and other sons of the king and of the said queen *Anne*, and to the heirs of their bodies successively; and for want of such issue male, to the heirs male of the king, and the heirs of their several bodies; and for want of such issue, to the lady *Elizabeth*, their daughter and the heirs of her body, and so to their second, third, and other daughters; and for want of such issue, to the king's right heirs.

" If any by writing, printing, or exterior act maliciously do or " procure any thing to the peril of the king's person, or to the dis- " turbance of the king's enjoyment of the crown, or to the prejudice " or derogation of the marriage between him and queen *Anne*, or to " the peril, slander, or disherison of any of the issues or heirs made " by this act inheritable to the crown, it shall be high treason.

" If any by words without writing, &c. maliciously publish any " thing to the slander of the said marriage between the king and " queen *Anne*, or to the slander or disherison of the issues of the " king's body begotten on the said queen *Anne*, or other heirs in- " heritable to the crown, by virtue of this act, it shall be misprision " of treason :" an oath is appointed to be taken in pursuance hereof, and the refusers are guilty of misprision of treason ; provision is made for the custody of the heir of the crown during minority.

28 H. 8. cap. 7. the last act is repealed, and all intermediate of- fenses against that act in relation to queen *Anne* or the lady *Elizabeth* pardoned ; queen *Anne* and others attainted of treason ; the marriage between the king and queen *Catharine* annulled and judged void, and the issues between them to be illegitimate ; the marriage between the king and queen *Anne* judged void by sentence of divorce of the arch- bishop ; the same sentence confirmed, and the marriage with queen *Anne* judged and declared null and void, and the issues between them

[277] declared illegitimate and excluded from inheriting the crown : Levitical degrees settled. Children between the king and queen *Jane* shall be adjudged the king's lawful children, and inheritable to the crown ; the crown entailed to king *Henry VIII.* and the heirs of his body lawfully begotten, that is to say, to the first, sec- ond, and other sons of the king on the body of queen *Jane* begot- ten, and the heirs of their bodies severally ; and in default of such issue male, then to the first son and heir male of his body, and so to the second and other sons in tail ; and for the want thereof, to the first and other issue female between the king and queen *Jane* in tail :

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and for want of such issue, to the king's first and other issue female in tail; and for lack of issue of the king's body, to such person, and in such manner as he shall appoint by his last will or letters patent; provision against disturbances of the heir of his body so nominated under pain of treason; " And if any shall by words, writing, printing, or other exterior act directly or indirectly do or procure maliciously any thing to the peril of the person of the king, his heirs or successors having the royal estate of the crown, or maliciously or willingly by words, &c. give occasion, whereby the king, his heirs or successors might be interrupted of the crown, or for the interruption, repeal or adnullation of this act, or the king's disposal of the crown according to it, or to the slander, disturbance, or derogation of the marriage between the king and queen *Jane*, or any other lawful wife, which he shall hereafter marry, or to the peril, slander, or disherison of any of the issues and heirs of the king limited to be inheritable to the crown, or to whom the king shall by authority of this act dispose it, or that affirm, &c. the marriage between the king and queen *Catharine*, or between the king and queen *Anne* to be good, or slander the sentences of divorce above said, or publish their issues to be the king's lawful children, or shall attempt to deprive the king, the queen, or any made inheritable to the crown by this act, or to whom the king by authority of this act shall dispose thereof, of their titles, styles, names, degrees, or royal estate or regal power, or refuse to take an oath to answer such questions, as shall be objected to them [278] upon any clause of this act, or after taking the oath do contumuously refuse to answer such interrogatories, as shall be objected concerning the same, or shall refuse to take the oath enjoined by this act, they, their aiders, counsellors, maintainers and abettors shall be guilty of treason, and forfeit all their lands, &c. and all sanctuary excluded."

The form of the oath is set down in the act, and power is given to the king by will to dispose of the custody of the king's issue within age.

It is made treason to disturb such disposal, and also power is given to the king to dispose or give by will, &c. to any of his blood any title, style, name, honors, tenements, or hereditaments.

Nota. This act doubted whether the attempting any thing in parliament against the marriage of queen *Anne* might not bring them in

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danger of the act of 25 H. 8. and therefore took care both to repeal the act, and to discharge and pardon what had been attempted against it.

The clause enabling the king to dispose of any honours or lands to those of his blood by will was necessary, for without such an enabling act of parliament the king could not dispose thereof by *will*, but only by *letters patent* under the great seal, or for lands parcel of the duchy of *Lancaster* under the seal of the duchy.

But it seems, that as to the disposal of lands belonging to the crown or duchy by letters patent under these respective seals, the king had power without this act, or the 35 H. 8. cap. 1. to dispose thereof, and to bind his successors.

And this by reason of the special penning of those acts, which, as I think, did not entail the lands, that the king had *in jure coronæ* or *in jure ducatus Lancastriæ*, but only limits the succession of the crown and of the dignities, honors, prerogatives, pre-eminentures, authorities, or jurisdictions to the same annexed or belonging, which are but so many expressions of the parts or incidents of the regal dignity, and not of the lands or possessions of the crown, but those rested in the crown in fee-simple, as they were before those acts made.

And hence it is, that in the several acts of 34 H. 8. cap. [279] 21. 1 E. 6. cap. 8. 18 Eliz. cap. 2. 35 Eliz. cap. 3. 43 Eliz. cap. 1. for confirmation of letters patent, there is no clause to make them good, notwithstanding the entail of the crown, for it was not needful; but the lands granted by king Henry VIII. Edward VI. queen Mary, queen Elizabeth, stand effectual without any such confirmation, and yet the entail of the crown by these acts continued till the death of queen Elizabeth, at which time it was spent, and king James succeeded to the crown as the true heir thereof, without the help of any entail or nomination by Henry VIII.

And yet after all this the whole scheme was altered by the statute of 35 H. 8. cap. 1. for thereby after recital of the statute of 28 H. 8. and that the king had issue by queen Jane prince Edward, and the king had since married the lady Catharine; It is enacted, " That if " the king and prince Edward die without heirs of either of their " bodies, the crown shall remain to the lady Mary and the heirs of " her body under such conditions, as shall be limited by the king by " his letters patent, or his last will; and for want of such issue, or " upon breach of such conditions, to the lady Elizabeth and the heirs " of her body under such conditions, as shall be limited by the king
" by

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" by his last will or letters patent ; and in default of such issue, or
" upon breach of such conditions, to such persons and for such estates,
" as the king shall limit by his will or letters patent.

This act repeals the former oath of 28 H. 8. and directs the form of a new oath to be taken for the extirpation of the pope's pretended supremacy, and limits it to be taken by all that sue livery, have any office of the king's gift, receive orders, take degrees, and by all persons whom the king, &c. shall appoint, and that it shall be treason in such, who obstinately refuse to take the oath.

It is also enacted, " That if any person by words, writing, printing or exterior act maliciously or willingly do or procure any thing directly or indirectly for the repeal, annulation or interruption of this act, or any thing therein contained, or of any thing [280] that shall be done by the king in the limitation of the crown to be made as aforesaid, or to the peril, disherison or slander of any of the issues and heirs of the king being limited by this act to inherit and to be inheritable to the crown, or to the disherison or interruption of any person, to whom the crown is by this act, or shall be limited by the king as aforesaid, whereby they may be destroyed or interrupted in body or title of the inheritance of the crown, the same shall be high treason in the offenders, their main-tainers, aiders, counsellors, and abettors, saving to all persons, other than the parties attainted, their heirs and successors, all rights, &c. in the lands of the persons attaint."

And note, that notwithstanding the caution used in the act of 28 H. 8. for the pardon of the attempting to repeal the act of 25 H. 8. no such care was thought necessary here for the attempt or procurement to alter the law by act of parliament; for as it could not be restrained by a precedent act, so neither was it concerned within the penalty.

And thus much for those treasons, that related to the succession of the crown, which I have put together, notwithstanding many of them come after those other acts, which I shall hereafter mention.

By the 28 H. 8. cap. 10. which was the great concluding act against the papal authority, the asserting or maintaining of the papal authority is brought within the statute of *præmunire*, and he that obstinately refuseth the taking of the oath of abjuration thereby enacted, is subjected to the penalty of high treason.

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By 28 H. 8. cap. 18, marrying any of the king's children or reputed children, or his sisters, or aunts of the father's part, or the children of the king's brethren, or sisters, without the king's licence under his great seal, or deflowering of any of them, is enacted to be treason.

By 31 H. 8. cap. 8. the king and council's proclamation concerning religion or other matters are to be obeyed under such penalties, as they shall think requisite; they, that disobey them and then go beyond sea contemptuously to avoid answering such offense, [281] shall be guilty of treason, &c. saving to every person, other than the offenders, their heirs and successors, all right, &c.

By 32 H. 8. cap. 25. the marriage between the king and lady Anne Cleve, which had been dissolved by the sentence of convocation, was confirmed by parliament, with liberty for each party to marry elsewhere: if any by writing, printing, or exterior act, word or deed, accept, take, judge, or believe the said marriage to be good, or attempt any thing for the repeal or adnullation of this act, it shall be high treason in them, their aiders, counsellors, abettors, or maintainers, saving the rights of all, other than the offenders, their heirs and successors; and all persons that have acted against the said marriage are pardoned.

By 33 H. 8. cap. 21. Queen Catharine Howard was attainted of high treason, and all persons that had acted against her were pardoned: any woman, whom the king or his successors shall intend to take to wife, thinking her a pure and clean maid, if she be not so, and shall willingly couple herself in marriage to the king notwithstanding, without discovering it to the king before marriage, shall be guilty of high treason; and if any other know it and reveal it not, it shall be misprision of treason: the queen or prince's wife soliciting any person to have carnal knowledge of her, or any person soliciting the queen or prince's wife to have carnal knowledge of her, is treason in them respectively, their counsellors, aiders and abettors.

By 35 H. 8. cap. 3. The king's style (*Henricus octavus Dei gratia Angliae, Franciae & Hiberniae rex, fidei defensor, & in terrâ ecclesiae Anglicanæ & Hiberniae supremum capit*) is united and annexed to the imperial crown of *England*; and if any shall imagine to deprive the king, queen, prince, or the heirs of the king's body, or any to whom the crown is or shall be limited, of any of their titles, styles, names, degrees, royal estate, or regal power annexed to the crown of *England*, it shall be high treason, saving the right of all other than the offenders, their heirs and successors.

And

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And thus far concerning the several treasons enacted in this king's time, all which are nevertheless now abrogated and repealed by 1 E. 6. and 1 Mar. as shall be shewn.

II. There are several acts of parliament in this king's time, which concern trials of treason, some of which are in force at this day, and not repealed by any statute.

By 26 H. 8. cap. 6. The treason concerning counterfeiting, washing, clipping and minishing of money current within this realm, as likewise other felonies committed in *Wales* or the marches thereof, may be heard and determined before justices of goal-delivery in the next *English* county; but note, this extends not to other treasons, nor, at this day, to clipping or minishing the coin; for the acts, that made them treason at that time, *viz.* 3 H. 5. and 4 H. 7. stand now repealed, and the statutes of 5 Eliz. cap. 11. for clipping, and 18 Eliz. cap. 1. for minishing the coin, direct it to be tried by the course and order of the law; and so it is also for counterfeiting of foreign coin by the statute of 1 Mar. yea, and as to counterfeiting the coin of this kingdom, or any other offense touching coin, by the statute of 1 & 2 P. & M. cap. 11. the indictment and trial is directed to be according to the course of the common law; so that as to coin also the statute of 26 H. 8. is now out of doors.

28 H. 8. cap. 15. For trial of treason committed upon the high sea before the admiral, &c. by commission under the great seal; this statute as to trial of treason upon the sea stands unrepealed by 1 Mar. and whether as to treasons committed in any rivers, or ports, or creeks within the bodies of counties, it be not repealed by 1 & 2 P. & M. cap. 10. or by the statute of 35 H. 8. cap. 2. for trial of foreign treasons, is considerable.

By 32 H. 8. cap. 4. Treasons and misprisions of treason committed in *Wales*, or in other places where the king's writ doth not run, shall be tried before such commissioners of *oyer* and *terminer*, as the king shall appoint, as if committed in the same counties into which the commission is directed.

This is repealed by the statute of 1 & 2 P. & M. cap. 10. cited to be so adjudged in H. 14 Eliz. (m) Co. P. C. p. 24. because it is done within this realm, and so may be tried in [283] *Wales*.

(m) Lord Lushly's Case.

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33 H. 8. cap. 20. Concerning the proceeding touching the enquiry and trial of treason committed by persons, that become lunatic after the treason committed, without putting them to answer, and touching the execution of persons attainted of treason, and afterwards becoming lunatic, is repealed by the statute of 1 & 2 P. & M. cap. 10. vide Co. P. C. p. 4 & 6. both as to the indictment and as to the trial; but the forfeiture of persons attainted of treason, as to old treasons, stands in force.

33 H. 8. cap. 23. Treason or misprision of treason or murder committed by a person examined before three of the council, and found by them guilty, or suspected, may be enquired of, heard and determined before commissioners of *oyer and terminer* in any county of *England* to be named by the king, by jurors of the county in such commission: challenge for lack of forty shillings freehold allowed, peremptory challenge is ousted in treason or misprision of treason: trial by peers is saved.

This statute as to the indictment and trial of treason in any foreign county stands repealed by 1 & 2 P. & M. cap. 10. as was ruled by all the judges of *England* in *Somerville's case*, M. 26 Eliz. reported by justice *Clench*, n. 17. (n) against the opinion of *Stamford*, Pl. Cor. Lib. II. cap. 26. both as to the indictment and also as to the trial, for *Somerville* was indicted in the county where the offense was, and by a commission in *Middlesex* was tried by a jury of the county, where the offense was committed; but as to murder, it seems to stand unrepealed, and accordingly put in ure; *Crompton's justice* (o).

35 H. 8. cap. 2. Treasons, misprisions and concealments of treasons committed out of the realm shall be heard and determined by the court of king's bench, and tried by a jury of that county, where the court sits, or before commissioners and in such shire, where the king shall appoint by his commission, by good and lawful men of the same [284] shire, as if committed in the same shire: trial of a nobleman by his peers is saved.

Upon this statute these points have been resolved: 1. That this act is not repealed by 1 E. 6. or 1 & 2 P. & M. cap. 10. thus it was resolved in *Orrick's case*, Co. P. C. p. 24. 2. It extends to a treason committed in *Ireland*, resolved in *Sir John Perrot's case* (p), Co. P. C. p. 11. 3. It extends to a treason committed in *Ireland* by a peer of

(n) This is reported 1. And p. 204; (p) Stat. Tr. Vol. I. p. 181.
(o) p. 22. lord *Grovil's case*.

Ireland, so resolved in 22 Car. 1. in *B. R.* in *Macguire's case* (*q*).
 4 The commission in this act mentioned may be signed by the king's sign manual, or the warrant to the chancellor to issue the commission may be signed by the king's sign manual, and either of them is warranted by this statute, so resolved H. 36 Eliz. cited *Co. Pl. Cor.* p. 11. in the case of *Patrick Oculen*. 5. If an indictment be taken by virtue of this statute in the county of *Middlesex*, and then the bench is removed by adjournment into another county, if the prisoner pleads not guilty, it shall be tried by a jury of that county where the indictment is taken, because the words are, *that it shall be inquired, heard and determined by good and lawful men of the same county, where the said bench shall sit*. M. 35 & 36 Eliz. *B. R.* in the case of *Francis Dacres* cited *Co. Pl. Cor.* p. 34. but otherwise upon an indictment upon the statute of 5 Eliz. cap. 1. for refusing the oath of supremacy. *Co. Pl. Cor.* ibidem (*r*).

III. As touching the third point of forfeitures by treason I shall say little more, than what is said before in the preceding chapter concerning the forfeiture of tenant in tail:

Only it seems, that the law was taken upon the statutes of 33 and 36 H. 8. before mentioned, that if an abbot or a bishop were attainted of treason, that by force of the general words of *forfeiting all their lands, tenements and hereditaments* they forfeit the lands of their church, tho they had them in *autre droit*.

1. Because in the savings of these statutes, yea and in all the new statutes of treason made in the time of *Henry VIII.* above-mentioned, the saving runs, *saving to all persons other than the offenders, their heirs and successors such right, &c.* and the [285] exception of *successors* makes it probable, that they intended, when a sole corporation was attainted of treason, he should forfeit the lands of his church.

2. Because in the act of attainder of the archbishop of *Canterbury* 1 Mar. cap. 16. there is a special proviso, that it should not extend to the lands which he had in right of his archbishoprick; but that these should be saved, as if he had not been attainted.

3. Because by the act of 31 H. 8. cap. 13. it appears plainly, that the possessions of Monasteries, where the abbots were attainted of treason, came thereby to the crown, tho they are

(*q*, State Tr. Vol. I. p. 928. (*r*) The case of *Edmund Bonner*, Bishop of *London*.

not annexed to the court of augmentations of the king's revenues.

4. It is clearly admitted by the judges in the case of the Bishop of *Durham*, *Dy.* 289. that by force of the statute of 26 *H. 8.* the lands of abbeys, &c. came to the crown by the attainder of treason of the abbots, &c. and possibly it was in design at the time of the making of that statute:

But it is true, that before that statute of 26 *H. 8.* 1. The lands, which a person had in right of his church, were not forfeited by attainder of treason. 2. That altho the lands of a sole corporation such as were an abbot, prior, bishop, might be forfeited by attainder by the special penning of 26 and 33 *H. 8.* yet the lands of an aggregate corporation, as dean and chapter, mayor and commonalty, were not forfeited by the treason of the dean, or mayor, by virtue of those statutes, for the right of the land was in the commonalty and chapter, as well as in the dean or mayor, and not in them alone. 3. That at this day the attainder of treason doth not forfeit the lands of a bishop, parson or other sole ecclesiastical corporation: 1. Because the statutes of 1 *Eliz.* (f), and 13 *Eliz.* cap. 10. (t), disabling bishops, masters of hospitals, &c. to alien their possessions, disable them to forfeit as well as alien, or otherwise the statute would be illusory. 2. By the special penning of the statutes of *E.*

[286] 6. cap. 12. and 1 *Mar.* whereby it is enacted, that no penalties shall be inflicted for treason, other than such as be by 25 *E. 3.*

Concerning the forfeiture of lands in a county palatine by the attainder of treason out of a county palatine, or *e converso*.

By the statutes of 9 *H. 5.* cap. 2 18 *H. 6.* cap. 13. 20 *H. 6.* cap. 2. 31 *H. 6.* cap. 6. outlawries of treason, &c. in the county palatine of *Lancaster* were not to cause a disability of the person outlawed, nor induce any forfeiture of the lands or goods of the party outlawed lying out of that county; but by the statute of 33 *H. 6* cap. 2. these acts are repealed, and it is ordained, that the indicters in a county palatine (where the indictment supposes any person to be inhabiting out of the county of *Lancaster* within some other county of the realm) have lands to the yearly value of five pounds in that county, and that upon indictment to be taken out of the county palatine.

(f) This is not among the printed statutes. (t) This statute made perpetual by 3 *Car.* 1. cap. 4.

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of persons residing there, the indictors shall have a yearly freehold of five pounds, and that no process be made out upon any such indictments, till it has been examined by the king's justices, whether the indictors be so qualified.

But now by the statute of 27 H. 8. cap. 24. all powers in countys palatine for making of justices in eyre, of assise, of peace, of goal-delivery, are resumed, and such commissions are to pass under the great seal of *England*, only in *Lancaster* they are to be under the usual seal of *Lancaster*: all processes to be in the king's name under the *seale* of him, that hath the county palatine; all indictments, &c. are to conclude *contra pacem regis*, and all fines and amerciaments upon officers are resumed; so that now all process of outlawry, attainer, &c. in countys palatine are of the same effect and induce the same forfeitures, as if the offenses were committed, tried and determined in any other county of *England*.

But this alters not the title of the bishop of *Durham* or any other, that had royal forfeitures of treasons of lands within their liberty, or county palatine, for that is a distinct franchise, and not at all touched by the act of resumption, as appears by the case in *Dyer* (*u*) before cited, and by what is said in the precedent chapter [287] touching forfeitures by treason: and thus far for acts touching treason in the time of *Henry VIII*.

As touching treasons in the verge I shall particularly mention the same hereafter,

I come now to the time of king *Edward VI*.

1 E. 6. cap. 12. There are these several changes made by these several clauses.

1. It is enacted, that no act, deed or offense being by statute made treason or petit treason by words, writing, cyphering, deeds or otherwise whatsoever, shall be deemed or adjudged high treason or petit treasons but only such as be treasons or petit treasons in or by the statute of 25 E. 3. for declaring treason, and such offences, as hereafter by this act are expressed and declared to be treason or petit treason; and no other penalties to be inflicted upon the offenders in treason or petit treason, but what are ordained by that, or this statute.

2d clause repeals the statutes concerning heretics, *Lollards*, the six articles, selling of books of the scriptures, &c. ordained in the time of *R. 2. H. 5* and *H. 8*.

(*u*) *Dyer* 289.

3d clause

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3d clause repeals all felonies made by act of parliament, since 23 April 1 H. 8. that were not felonies before, and all penalties touching the same.

4th clause repeals the act of 31 H. 8. touching obedience to the king's proclamations, and the statute of 34 H. 8. imposing penalties upon the disobedient.

5th clause enacts certain new offenses, viz. " If any shall by preaching, express words or sayings affirm and set forth that the king, his heirs or successors, kings of this realm, is not or ought not to be supreme head on earth of the church of *England* and *Ireland* immediately under God, or that the bishop of *Rome*, or any besides the king for the time being, ought by the laws of God to be supreme head of the same churches, or that the king, his heirs or successors, kings of this realm, ought not to be king of *England*, *France*, and *Ireland*, or any of them, or do compass by open preaching, express words or sayings to depose or deprive the king, his heirs or successors kings of this realm, from his [288] " royal estate or titles to the same kingdoms, or do openly publish, or say by express words or sayings, that any person, other than the king, his heirs or successors kings of this realm, of right ought to be king of the realms aforesaid, or any of them, or to have or enjoy the same or any of them, the offenders, their counsellors, aiders, abettors, procurers and comforters, for the first offense shall lose his goods, and suffer imprisonment during the king's pleasure; and if after such conviction he shall commit the same offense again, other than such as be expressed in the statute of 25 E. 3. he shall forfeit to the king the profits of his lands, benefices, and ecclesiastical promotions during his life, and all his goods, and suffer perpetual imprisonment; and for the third offense after a second conviction, he shall be guilty of treason, and suffer and forfeit as a traitor.

6th clause enacts that, " If any person shall by writing, printing, overt-act or deed, affirm or set forth, that the king of this realm for the time being, is not or ought not to be supreme head on earth of the churches of *England* and *Ireland*, or any of them immediately under God, or that the bishop of *Rome* or any person, than the king of *England* for the time being, is or ought to be supreme head on earth of the same churches or any of them, or do compass or imagine by writing, printing, overt-deed or act to " depose

" depose or deprive the king, his heirs or successors from the royal
" estate or titles of king of *England, France* and *Ireland*, or any of
" them, or by writing, printing, overt-a&t or deed, do affirm, that
" any person, other than the king, his heirs and successors, of right
" ought to be king of the realms of *England, France* and *Ireland*, or
" any of them, then every such offender shall be guilty of treason,
" and suffer and forfeit, as in case of high treason.

7th clause enacts, " That this a&t shall not extend to repeal any
" statutes touching the counterfeiting, clipping, filing or washing
" the coin current of this kingdom, or importing counterfeit coin, or
" counterfeiting the king's sign manual, privy seal, or privy signet,
" their abettors, &c.

8th clause enacts, " That if the persons declared by the act of 35
" H. 8. to be inheritable to the crown do usurp one upon the [289]
" other, or interrupt the king's possession of the crown, they,
" their abettors, &c. shall be traitors.

9th clause takes away clergy from persons found guilty by verdict,
confession, or not directly answering or standing mute in cases of
murder of malice prepense, of wilful poisoning, house-breaking, any
person being in the house and put in fear, robbing in or near the
highway, horse-stealing, sacrilege; but in all other cases of felony
clergy allowed, and sanctuary the same as before the 24 April 1
H. 8.

10th clause provides, that all the statutes of H. 8. concerning chal-
lenge, or concerning trial of foreign pleas, shall stand in force.

11th clause declares, that no person already arrested or imprisoned,
indicted or convicted, or outlawed for treason, petty treason or mis-
prison of treason, shall have any advantage of this act.

12th clause provides, that wilful killing by poison shall be deemed
wilful murder, and the offenders, their aiders, abettors, counsellors
or procurers shall suffer, as murderers.

13th clause enacts, that a lord of parliament in all cases within the
benefit of clergy, tho he cannot read, yet shall be delivered as a clerk
convict without burning in the hand, or loss of lands, &c.

14th clause saves the trial by peers for any offenses within this
statute,

15th clause enacts, that clergy be allowed, notwithstanding the
offender have been married to a single woman or widow, or to two
wives or more.

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16th clause enacts, that notwithstanding attainder of treason, petit treason, misprision of treason, murder or felony, the wife shall have her dower, and saves to all and every person, other than to the offender attainted, convict or outlawed, all such right, title, interest, entry, leases, possession, condition, profit, commodity, and hereditaments, as they had before or at the time of the attainder, conviction, or outlawry.

17th clause provides, that the statute of 27 H. 8. for felony in servants stealing the goods of their masters, shall stand in force.

[290] 18th clause provides, that no person be put to answer for any of the offences abovesaid concerning treason by preaching or words only, unless accused before one of the king's council, justice of assize or peace, &c. within thirty days after the offense committed.

19th clause, concealing and keeping secret any high treason shall be misprision of treason, and the offender shall forfeit as heretofore hath been used in case of misprision of treason.

20th clause, calling, writing or printing the *French* king king of *France* shall not be adjudged any offense within this act.

21st clause provides, that no person shall be indicted, arraigned, condemned or convicted for any offense of treason, petit treason, misprision of treason, or for any words before mentioned, whereby he shall suffer pains of death, loss of goods, imprisonment, &c. unless the offender be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same.

I have mentioned the clauses of this statute at large, and by their numbers, because there be many things observable thereupon.

By the first clause of this statute all those numerous treasons and petit treasons, that were enacted or declared at any time since 25 E. 3. are wholly taken away, except that of counterfeiting, clipping, washing, or filing of coin, &c. excepted in the 7th clause; but this doth not mention misprisions of treason, but only declares what misprision of treason is, for by taking away the treasons themselves, the misprisions of those treasons must needs cease, as a crime.

But this act did not extend to alter the trials in case of treason, and therefore notwithstanding this act the statute of 28 H. 8. cap. 15. for treasons at sea, 26 H. 8. cap. 6. for counterfeiting &c. in *Wales*, 32 H. 8. cap. 4. for treasons in *Wales*, 33 H. 8. cap. 23. for treasons to be tried out of their county, 35 H. 8. cap. 2. for trial of foreign treasons,

treasons, stood yet in their force, until the statute of 1 & 2 P. & M. cap. 10.

Again, notwithstanding that by some former statutes certain offences, which were felony before, as wilful burning of houses and poisoning, were made treason, yet the repeal of those [291] acts that made them treason leaves them nevertheless in the state, wherein they before were, namely felony.

Again, upon consideration and comparison of the 5th and 6th clauses these things are observable, namely, 1. The wisdom of the law-makers, that put the very same offenses in words spoken in a lower rank of punishment than the same things written or printed, making the former but a misdemeanor in the first offense, which in printing or writing was treason in the first offense. 2. it is observable upon that fifth clause, that there were some things within the fifth clause, that might be treason or an overt-act of treason within the statute of 25 E. 3. (*other than such as are expressed in the statute of 25 E. 3.*) *vide que supra dicta sunt cap. 13.* touching the treason in compassing the king's death.

It is also observable upon the 11th clause, that when an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal, unless a special clause in the act of repeal be made enabling such proceeding after the repeal, for offenses committed before the repeal, as there is in this case.

3 & 4 Ed. 6. cap. 5. Tho' it primarily concerns riots, yet consequently it concerns treason also: thereby it is enacted,

1. "That if any persons to the number of twelve or more assembled together shall intend, go about, practise or put in ure with force of arms unlawfully, and of their own authority to kill, take or imprison any of the king's privy council, or unlawfully to alter or change any laws established by parliament for religion, or any other laws or statutes of this realm, and being commanded by the sheriff, justice of peace, mayor, &c. by proclamation in the king's name to repair to their houses, If they shall continue together by the space of one whole hour after such proclamation, or after that shall willingly in forcible and riotous manner attempt to do or put in ure any of the things aforesaid; this shall be adjudged treason in all the offenders, their aiders, abettors and procurers." [292]
See before in chapter XIV. concerning levying of war, how much of this high treason is within the statute of 25 E. 3.

2. "That

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2. "That if any persons to the number of twelve or more shall intend, go about, practise or put in ure in manner aforesaid to overthrow, cut, break or dig up pales, hedges, ditches or other inclosure of any park, inclosed grounds, banks of pools or fish-ponds, conduits, conduit-heads or pipes to the same, which may remain open, or unlawfully to have common or way in the said park or grounds, or to destroy the deer, warrens of conies, dove-houses, fish, or to pull down houses, mills, bays or barns, or to burn stacks of corn or grain, or to diminish the rents or yearly values of any manors, lands, &c. or the price of any victuals, corn or grain, or any other thing usual for the sustenance of man, and being required, as before, shall not depart, but continue an whole hour, or shall after that forcibly attempt to do or put in ure the things aforesaid they shall be adjudged felons without benefit of clergy."

Vide supra cap. 14. which of these offenses were a levying of war against the king.

3. "That if any person unlawfully and without authority by ringing of bells, sounding of drums, trumpet, horn, or other instrument, by firing of beacons, by malicious uttering of words, casting of bills or writings, or by any act whatsoever raise or cause to be assembled any persons to the number of twelve, or above, to the intent that they shall do any of the acts aforesaid, who shall not dissolve their assembly upon such proclamation within an hour, or shall commit any of the said acts, then they, that raise such assemblies, shall suffer as felons."

4. If such assemblies to the number of forty, and above, shall continue together two hours, or shall bring weapons, meat, &c. to the persons so assembled, it shall be high treason.

5. If above the number of two and under twelve attempt such things, &c. as aforesaid, they are to suffer imprisonment for a year, and make fine and ransom, with treble damages to persons damaged.

6. In the cases of treason within this act tenant in tail is [293] to forfeit to the king during life only, and tenant in fee simple to forfeit only as upon attainder of felony.

7. Power is given to the sheriffs, justices, mayor, &c. to raise power, and array them in manner of war against the rioters, to the intent to apprehend the rioters; and if the said rioters do not depart upon

upon proclamation but continue together, it shall be lawful for the sheriff, &c. after such commands to kill the rioters; if after such commandment it fortune any of the rioters be killed upon such account, the sheriff, &c. or any assembled by him shall thereof be discharged: then follows the punishment of those, who refuse to assist the sheriff, or justice in the repression of riots.

Movers to such riots are guilty of felony without clergy, and persons sollicited thereunto not revealing it to suffer three months imprisonment.

This act being made in a great measure for the support of the reformed religion under *Edward VI.* was as to all points of treason therein contained, repealed by 1 *Mar. cap. 1.* but in effect the very same offenses were enacted felonies within clergy by 1 *Mar Jeff. 2. cap. 12.* which was to continue to the end of the next parliament, and after the death of queen *Mary* was re-enacted by 1 *Eliz. cap. 16.* to continue during her life, and till the end of the next session after her death, but then expired.

That which I would observe upon this act is this, how careful they were in this time not to be over-hasty in introducing constructive treasons, and to shew how the opinions of the parliaments of *Edward VI.* queen *Mary*, queen *Elizabeth* went, as to the point of constructive treason, and how careful they were not to go far in extending the statute of 25 *E. 3.* beyond the letter thereof.

As to the point of indemnifying those, that killed the rioters in assistance of the sheriff, it is true, that the killing of rioters barely for continuing together after proclamation required a new law to indemnify it, as in the statute is provided; but if rioters resist the sheriff in his endeavour to apprehend them, or make head against him, or continue to put in ure their riotous acting, as pulling down houses, inclosures, &c. if the sheriff, or those that come in aid of him, kill any of them, the law and the statute of 2 *H. 5. cap. 8.* do indemnify them, as shall be hereafter more fully declared.

By 5 & 6 *E. 6. cap. 11.* " If any person by open preaching, express words or sayings do expressly, directly and advisedly set forth and affirm, that the king, that now is, is an heretic, schismatic, tyrant, infidel, or usurper of the crown, or that any his heirs or successors, to whom the crown is to come by the statute of 35 *H. 8.* being in lawful possession of the crown, is an heretic, schismatic, tyrant,

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“ tyrant, infidel, or usurper of the crown then such person, his aiders,
“ abettors, procurers, counsellors, and comforters knowing the same,
“ shall for the first offense lose their goods and be imprisoned at the
“ king’s will, for the second offense, after conviction for the first,
“ lose the profits of their lands and ecclesiastical benefices during their
“ lives, and be perpetually imprisoned, and for the third offense, after
“ the second conviction, be adjudged traitors, and lose their lives, and
“ forfeit as in case of high treason.

“ If any person shall by writing, printing, painting, carving or
“ graving, directly, exprefly and advisedly publish, set forth and affirme,
“ that the king, or any his heirs or successors, &c. is an heretic,
“ schismatic, tyrant, infidel, or usurper, it shall be high treason, and
“ he shall forfeit as in case of high treason.

“ If any person or persons rebelliously detain the king’s castles, or
“ fortresses, ships, ordinance, artillery or fortifications, and do not
“ render them up to the king, his heirs or successors within six days
“ after proclamation under the great seal, it shall be treason, and the
“ offender, his aiders, &c. knowing of the faid offenses shall suffer
“ and forfeit as in case of high treason.

“ If any the king’s subjects commit treason contrary to this act or
“ any other act in force out of the realm, it shall be inquired and
“ presented by twelve men of any county, which the king by com-
“ mission shall assign, as if committed within the realm, and the like

[295] “ process thereupon, as if done within the realm, and the
“ outlawry against an offender inhabiting out of the realm
“ shall be as effectual as if he had been resident within the realm.

“ But if he render himself upon the outlawry within a year, he
“ shall be received to traverse the indictment (x).

“ Persons attainted of any treason shall forfeit to the king all their
“ lands of any estate of inheritance in their own right at the time of
“ the treason committed, or at any time after.

“ No proceeding shall be on any the offenses aforesaid committed
“ only by preaching or words, unless the offender be accused thereof
“ within three months before one of the king’s council, justice of

(x) This clause remains, as our author observes below, unrepealed to this day, so that it was great injustice to deny the benefit of a trial within the year to Sir Thomas Armstrong, who was out-lawed, while he was beyond sea, 36 Car. 2. and of this opinion was the house of commons by their vote Nov. 19, 1689. when it was re-

solved, that Sir Thomas Armstrong’s plea ought to have been admitted according to the statute of 5 & 6 E. 6. see State Tr. Vol. III. p. 896. and accordingly the like plea was allowed to Jobson, who was indicted for counterfeiting the coin, Mich. 2 Ges. 2. B. R. altho he had broke prison, and was retaken in England.

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" of assise, justice of peace being of the *quorum*, or two justices of
" peace in the shire, where the offense is committed: concealment
" of any high treason shall be adjudged only misprision of treason,
" and the offender to forfeit as in misprision of treason.

" Provided that no person shall be indicted, arraigned, condemned,
" convicted or attainted for any of the treasons or offenses aforesaid,
" or for any other treasons, that now be, or hereafter shall be, which
" shall be hereafter perpetrated, committed, or done, unless the same
" offender or offenders be thereof accused by two lawful accusers,
" which said accusers at the time of the arraignment of the party ac-
" cused, if they be living, shall be brought in person before the party
" so accused, and avow and maintain that which they have to say
" against the said party to prove him guilty of the treasons or offenses
" contained in the bill of indictment laid against the party arraigned,
" unless the party arraigned shall willingly without violence confess
" the same: a saving of the right of all, other than the offenders
" and their heirs, or such as claim to their or any of their use: the
" wife of the party attainted of these or any other treasons [296]
" shall be barred of dower of the lands of the party attainted,
" so long as the attainder stand in force."

Upon this statute many things are observable, 1. That it should seem, that neither the writing of these scandalous words, nor the bare detaining of the king's forts or ships were treason within the statute of 25 E. 3. for if they had been such, this act would not have been made. 2. The *second* thing observable is the great discrimination, which in this act is made between words and writing, the latter being made treason, the former only misdemeanor in the two first offenses, altho the words be the same in both. 3. That so much of this act, as is introductory of new treason, is repealed by the statute of 1 Mar. cap. 1. but whether those two penalties previous to treason in case of words, *viz.* for the first and second offense, be repealed by any statute, seems doubtful, for those are not treason. 4. But those clauses in this statute, that concern trial of foreign treasons, concerning outlawry of persons beyond the sea, forfeiture of lands of inheritance of the party attainted, loss of dower by the wife of the party attainted, stand unrepealed to this day; and so it is held by many, that the clause concerning two accusers stands still on foot; *de quo vide postea.*

Touching the clause for the forfeiture of the lands of the party attainted there are these things considerable.

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1. That by this clause tenant in tail of the gift of the king doth by his attainer forfeit his estate-tail, notwithstanding the statute of 34 H. 8. cap. 20. for as that statute coming after 26 & 33 H. 8. did, as to that case, repeal so much of those acts; so this statute of 5 & 6 E. 6. coming after 34 H. 8. doth repeal that statute, as to the case of attainer of treason of such donee in tail.

2. That this act varies much from the penning of the acts of 26 and 33 H. 8. for they seemed, as hath been observed, to fasten upon lands in right of a corporation sole, as bishop, abbot, &c. but this limits it only to lands in their own right, which possibly, tho' an affirmative clause, may correct the extent of the statutes of 26 and 33 H. 8. and bind up the forfeiture to lands only in their own right.

[297] As to the point concerning the two lawful accusers these things will be considerable, 1. Whether it extends in law to new treasons made after this act. 2. Whether by any statute this be repealed. 3. Admitting it be not, what shall be said two lawful accusers. 4. What a confession.

I. The statute of 5 & 6 E. 6. above-mentioned appoints two lawful accusers in case of all treason enacted or to be enacted; therefore if a new treason were made by a subsequent act of parliament without any clause that directs the indictment or trial in any other manner than is appointed by 5 & 6 E. 6. by the words of this act there must be two lawful accusers, both upon the trial and indictment.

But there have been great opinions, that tho' the words of 5 & 6 E. 6. extend to treasons that shall be hereafter enacted, yet this clause doth not extend in law to such new treasons, unless special provision be made for the same in the act making such new treason: others have been of a contrary opinion, because it only concerns the manner of proceeding, which may be directed by a precedent act, as upon the statute of 18 Eliz. cap. 5. 21 Jac. cap. 4.

II. But certajnly, if there be, by a subsequent statute, any derogatory clause from this statute, then there need not be two lawful accusers.

Therefore upon the statutes of 1 & 2 P. & M. cap. 11. in treason for counterfeiting the coin current here, or for clipping and impairing of coin (which was then conceived a treason not repealed by 1 Mar. cap. 1.) the evidence and course of proceeding at common law both upon the indictment and trial are restored, and so no necessity of two witnesses; this is agreed on all hands. *Co. Pl. Cor. p. 25.*

Again,

Again, tho the treason for clipping or washing of coin declared by *3 H. 5. cap. 6.* were repealed by the statute of *1 Mar. cap. 1.* as is declared by the preamble of the statutes of *5 Eliz. cap. 11.* and *18 Eliz. cap. 1.* and that the same is newly made treason by the statutes of *5* and *18 Eliz.* and consequently, were there no more in the case, two witnesses might be requisite by the words of the act of *5 & 6 Ed. 6.* because those are newly made treasons, yet by the penning of those statutes of *5* and *18 Eliz.* it is not necessary, because the words in both statutes are *being lawfully convicted* [298] *or attainted according to the order and course of the law,* which takes in the whole proceeding, as well indictment as trial; for the course of law therein mentioned seems to be intended the common law, and at common law there was no necessity of two witnesses in any case of treason.

And altho the statute of *1 & 2 P. & M. cap. 11.* did take clipping and washing to be continuing treasons, and therein might mistake, yet there being an express clause in that statute, that in those cases the evidences at common law should be restored; this direction might take off the statutes of *1 & 5 E. 6.* as to the two witnesses in those cases, and so have an influence upon the statutes of *5 & 18 Eliz.* or at least may go far in expounding them to restore the evidence required at common law in those cases.

But whether, as to all other treasons, the general clause in the statute of *1 & 2 P. & M. cap. 10.* that *all trials hereafter to be awarded or made for any treason shall be had and used only according to the due order and course of the common laws of this realm and not otherwise,* have taken away the necessity of two witnesses upon the indictment, hath been controverted (*y*), for on all hands it is agreed, that it takes away the necessity of two witnesses upon the trial, if there were no more in the case.

My lord Coke in *Pla. Cor.* p. 25, 26. delivers his opinion, that two witnesses are necessary upon the indictment in case of all treasons, other than those, that are for counterfeiting, clipping, or impairing the coin, and gives many weighty treasons for it, and cites a resolution in *14 Eliz.* lord Lumley's case, and *4 Mar. Bro. Corone,* 219. for according to him the indictment is a distinct thing from the trial; therefore the statute of *1 & 2 P. & M. cap. 10.* extending only to the trial doth not take away the necessity of two witnesses

(y) See *Kel.* 9, 18, 49.

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upon the indictment, and accordingly the general opinion hath run thus since (z).

[299] But yet much is to be alledged, that the statute of 1 & 2 P. & M. cap. 10. extends as well to reduce the indictment, as the trial, to the course of the common law.

1. Because it seems to be the intent of the statute to involve the indictment under the general appellation of the trial, according to 2 & 3 P. & M. Dy. 132. a. and tho it is true, that 1 P. & M. Dy. 99, 100. in *Thomas's* case there were two accusers required, yet that was before the statute of 1 & 2 P. & M. cap. 10.

2. Because this statute of 1 & 2 P. & M. cap. 10. in other cases extends as well to the indictment, as the trial; it is agreed, that the statute of 33 H. 8. cap. 23. concerning trial of treason in a foreign county, is wholly repealed by 1 & 2 P. & M. cap. 10. *quod vide Co. P. C. p. 27. Dy. 132.* whereas, if it should only refer to the trial, the indictment might still be in a foreign county, and so he might be indicted in a foreign county, and yet must be tried in the proper country: *vide* accordingly resolved H. 12 Eliz. Dy. 286. b. touching the rebels in the North, where *Stamford's* opinion, Lib. III. cap. 26. (a) is denied by all the judges of both benches; again, the statute of 33 H. 8. cap. 20. touching the indictment and trial of lunatics in any county the king shall appoint, is repealed by this act of 1 & 2 P. & M. cap. 10. as well to the indictment as the trial: *vide Anders. Rep. n. 154. Arden's* case (b).

3. The indictment is in common speech a part of the trial, or at least a necessary incident to it; and if it should be necessary to have two witnesses to the indictment, it would consequently be necessary to have them upon the trial also; for by the statute of 5 & 6 E. 6. cap. 11. the two witnesses, that are upon the indictment, must avow their testimony in the presence of the party upon his arraignment: and it seems incongruous, that a greater evidence should be required to the indictment, which is only an accusation, than to the trial (c), where the party is to be convicted; therefore, if the statute of 1 & 2 P. & M. intended to take it away upon the trial, it cannot

[300] be supposed to continue the necessity of two witnesses upon the indictment.

(z) *State Tr. Vol. III. p. 56.* the case of lord *Cavilemain*, *Ibid. p. 415.* earl of *Suffolk's* case; p. 645. lord *Russell's* case, p. 733. colonel *Sidney's* case.

(a) *S. P. C. p. 90.*

(b) *1 And. 105.*

(c) Lord *Coke P. C. p. 25.* says the greatest proof is most of all necessary at the time of the indictment, because that is the foundation of all the rest, and is commonly found in the absence of the party accused.

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4. There is also a great authority for this opinion: *vide* the resolution and reason of the judges in *Arden's case*, *Andrs. Rep.* n 154. (*d*), where they resolved, that they could not be indicted in a foreign county upon the statute of 33 H. 8. cap. 23. because the statute of 1 & 2 P. & M. cap. 10. restoreth the common law as well in relation to the indictment as the trial, and the trial includes the indictment; and this was by all the justices and barons so resolved, which case is also reported by justice *Clench.* n. 17. to be 19 Novem. 26 Eliz. Again *ibidem* n. 28. "Fuit tenus per les justices, " que ou le statut de E. 6. est, que inditement de treason sera per 2 " testes, & le statut de reine Mary est, que treasons sey try solonc le " common ley, que ore inditements sey solonc le common ley; car " inditement est parcel de tryal, car nul tryal poet estre sans indite- " ment, and sic fuit in *Somerville's & Arden's case*.

5. It hath been the care of the parliaments since in their acts to make provision for two witnesses in cases of treasons newly made, *vide* statutes 13 Eliz. cap. 1. 13 Car. 2. cap. 1. so that it was thought that the statute of 5 & 6 E. 6. was not of force as to the two witnesses, at least as to treasons newly enacted, otherwise in cases of new treasons they needed not these provisions (*e*).

And thus the reasons stand on both sides, and tho these seem to be stronger, than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger; *quod dubitas, ne feceris*, especially in cases of life (*f*); but upon misprision of treason two witnesses are [requisite both upon the indictment and trial. *Co. Pla. Cor.* p. 24.]

III. The third thing considerable in this clause is, [301] what shall be said *two lawful accusers* within this statute, if it be of force.

As to the accusers mentioned in the statute of 5 & 6 E. 6. cap. 11. they are no other than the two lawful and sufficient witnesses mentioned in the statute of 1 E. 6. cap. 12. *in fine*; this is agreed by my lord *Coke*, *Pl. Cor.* p. 25.

(*d*) *1 And.* 107.

(*e*) If it were only questionable, that was reason sufficient for making such provision. *Vide supra* p. 261.

(*f*) However since our author wrote this matter is in great measure settled by 7 W. 3. cap. 3. whereby it is enacted, "That in all cases of high treason, whereby any

" corruption of blood, &c. no person shall be indicted, tried or attainted, but upon the oaths of two lawful witnesses to the same treason; but out of this act are excepted all proceedings in parliament, or proceedings for counterfeiting the king's coin, great seal, privy seal, or signet or signs manual.

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Now what are lawful witnesses in this case is considerable; the lawfulness of witnesses must respect either, 1. The persons, or else, 2. The testimony of the witnesses.

1. As in relation to the persons of witnesses, those are said lawful witnesses, which by the laws of *England* are allowed to be witnesses.

A *feme covert* is not a lawful witness against her husband (*g*) in case of treason, yet in lord *Castlehaven's* case (*h*) upon an indictment for a rape upon his lady by another by her husband's present force, she was received as a witness by the advice of the judges, that assisted at that trial, and upon her evidence he was convicted and executed.

But a woman is not bound to be sworn or to give evidence against another in case of theft, &c. if her husband, be concerned, tho' it be material against another, and not directly against her husband. *Dalt. cap. 111 (i)*.

Upon an indictment upon the statute of 3 *H. 7. cap. 2.* for taking away forceably and marrying a woman, the woman so married may be sworn against her husband, that so marries her, if the force were continuing upon her till the marriage; and thus it was done in the case of the lady *Fulwood*, *M. 13. Car. 1. B. R. Croke* (*k*) and accordingly *seriatim* resolved by all the judges of the king's bench lately in the case of *Brown*, *Trin. 25. Car. 2. (l)* for these reasons: 1. Because otherwise the statute would be vain and useless, for possibly all that were present were of the offender's confederacy. 2. The marriage, tho' a marriage *de facto*, yet, if it were effected [302] by a continued act of force, was not a marriage *de jure*, for it was dissolvable by divorce, unless ratified by a subsequent free cohabitation or consent. But 3dly and principally, because it was *flagrante criminis*, for the child was taken away upon the *Thurday*, married the *Friday*, and seized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. 4. There were other witnesses, that proved the first taking away by force against the child's will, tho'

(g) *Co. Lit. 6. 8.*

(h) *Hut. 115. Rufb. Collect. Vol. II. p. 93--101. State Tr. Vol. I. p. 366.*

(i) *N. Edit. cap. 164. p. 540.*

(k) *Cro. Car. 482, 484, 488, 492. the*

like was done in the case of *Haagen Svend-*

sen, Mich. 1 Ann. B. R. State Tr. Vol. V. p. 453.

(l) *1 Vin. 243. 3 Keb. 193.*

there

there were no witnesses to prove the marriage forceable but herself, who expressly swore, that she was married against her will; upon all which circumstances it was ruled, that she should be examined in evidence, and the credibility of her testimony left to the jury; but most were of opinion, that had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband; he was convicted and had judgment of death, and was executed.

Regularly an infant under fourteen years is not to be examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact may allow an examination of one under that age (*m*), as in case of witchcraft an infant of nine years old has been allowed a witness against his own mother. *Dalton* (*n*).

And the like may be in a rape of one under ten years upon the statute of 18 *Eliz. cap. 6.* and the like hath been done in case of buggery upon a boy upon the statute of 25 *H. 8. cap. 6.*

And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason: *vide quæ supra dixi p. 26.*

A man concerned in point of interest is not a lawful accuser or witness in many cases, the party to an usurious contract, cannot be a witness to prove an usurious contract, upon an information, if the money be not paid, for he swears to avoid his own debt or security (*o*); but if the money be paid he may [303] be a witness to prove it, where another informs, for he is to gain nothing.

And therefore if any man hath the promise of the goods or lands of the party attainted, he is no lawful witness to prove the treason.

A person outlawed in trespass is nevertheless a lawful witness, but no lawful jurymen or indictor in case of felony or treason, Sir *William Withipoll's case* (*p*).

A father or son or adversary in a suit is a witness for or against a person accused of any crime, yet not always a competent jurymen.

(*m*) By the laws of *Ius* a child ten years old was allowed to be a witness in theft. *Vide L. L. Ius. l. 7.*

(*n*) *Dalt. Just. N. Edit.* p. 542.

(*o*) *Co. Lit. 6. b.*

(*p*) *Cro. Car. 134. 147. W. Jones 198.*

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A *particeps criminis* is in some cases a lawful accuser within this statute, in some cases not.

An approver shall be sworn to his appeal, *Stamf. Pla. Cor. (q)*; but it seems, that he shall not be a witness upon the trial, if the party accused put himself upon his country, because, if he fail in proving the party guilty, he shall be hanged.

In Sir *Percy Crefby's* case, *P. 19 Jac. Noye's Rep. p. 154. placito 676. in Camera Stellata*, if two defendants be charged for a crime, one shall not be examined against the other to convict him of an offense, unless the party examined confess himself guilty, and then he shall be admitted.

9 Dec. 15 Car. 2. at *Newgate*, *Henry Trew* was indicted of burglary, and by advice of *Keeling* chief justice, *Brown* justice, and *Wilde* recorder, *Perrin* that was in goal for two other robberies, and confessed himself to be in this burglary, was sworn as a witness against *Trew*, but he was not indicted of the burglaries or robberies. *Ex libro Bridgman.*

10 Dec. 1662. *Tonge, Philips, and others (r)* were indicted for treason for compassing the king's death, the question was, whether those, that were parties in the compassing, which were not yet pardoned, nor indicted, might be produced as witnesses, namely *Riggs* and others; and upon conference with all the judges these points were resolved.

1. That the party to the treason, that confessed it, may be [304] one of the two accusers or witnesses in case of treason, for the statute intended two such witnesses, that were allowable witnesses at common law, and so may a *particeps criminis* be admitted as a witness, and was admitted to give evidence to the jury; but the jury may, as in other cases, consider of the evidence and credit of the witnesses, but he is sufficient to satisfy the statute.

2. That the confession before one of the privy council or a justice of the peace being voluntary made without torture is sufficient as to the indictment or trial to satisfy the statute, and it is not necessary, that it be a confession in court; but the confession is sufficient, if made before him that hath power to take an examination.

3. The king having promised a pardon to *Riggs*, if he would discover the plot, he performed that part by his discovery; and this was

(q) *Lib. II. cap. 86. p. 45. a.*

(r) *Kelk 17. State Trials, Vol. II. p. 48.*

held

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held by all no impediment to his testimony, for the promise was not applied to witnessing against any other; but two justices (*f*) held, that if the king promised a pardon upon condition, that he would witness against any others, and that being acknowledged by *Riggs* when he took upon him to give evidence, &c. that will make him uncapable to give evidence, because he swears for himself (*t*); but in this point the greater number were of a contrary opinion (*u*), *ex libro Bridgman verbatim*, and I remember the consultation and resolution accordingly.

And accordingly at the sessions of *Newgate* 1672. *Mary Price* was convicted of treason in clipping the current money of *Englanā* by the testimony of those, that were *participes criminis* (*x*), namely *Thregmerton* and others, who brought her broad money upon allowance of 10*l. per Cent.* and carried off the clipt money into their master's cash.

The like conviction was in the same year of *Hyde* and others of robbery upon the highway by one that was a party [305] in the robbery, but not indicted.

But in these and the like cases 1. The party that is the witness, is never indicted, because that doth much weaken and disparage his testimony, but possibly not wholly take away his testimony. 2. And yet, tho such a party be admissible, as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be also very considerable circumstances, which may give the greater credit to what he swears.

If *A. B.* and *C.* be indicted of perjury on three several indictments concerning the same matter, *A.* pleads not guilty, *B.* and *C.* may be examined as witnesses for *A.* for yet they stand unconvicted, altho they are indicted, 19 *Car. 1. B. R. Bilmore's case.*

By the statute of 1 & 2 *P. & M. cap. 14.* justices of peace ought to examine the party and take informations touching offenses brought before them, and certify them at the next goal-delivery.

(*f*) These were our author and *J. Brown.*

(*t*) *Vide postea part. 2. cap. 27.*

(*u*) Of this contrary opinion was the court in the case of *Christopher Loyer, Mich. g Geo. I. B. R. State Tr. Vol. VI. p. 259.*

(*x*) But it does not appear in this case, whether they were promised a pardon or not: the like resolution was in the case of *Joseph Clark* for coining 16 *Car. 2. see K. 33.* but in that case the witness had actually obtained a pardon.

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Tho justices of peace cannot hear and determine treason by virtue of their commission of the peace, no nor take an indictment of it, yet they may take examinations and informations touching such offense of the party brought before them, and certify them according to that statute ; and those informations taken upon oath, as they ought to be, and sworn to, by the justice or his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be dead, or not able to travel, and sworn so to be ; yea by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable.

And in such case information upon oath taken before justices of the peace of one county may be transmitted before justices of goal-delivery of that county, where the offense was committed, viz. if the offender [306] were brought before that justice; *quare tamen*, because the offense was out of his jurisdiction; yet *vide Dalt. cap. 111. p. 299. accordans (y).*

He, that hath a remainder expectant upon an estate tail, shall not be allowed as a witness, and so ruled, but a disseisor may be a witness to a deed made to the tenant. 12 *Aff.* 12.

Mich. 1652. A commission issued to examine the validity of a marriage supposed to be done by force, and upon *that* a divorce was had: an indictment was against *Welsh*, that married the woman, the depositions in the cause of divorce were offered to prove the force, but rejected, because in a suit of another nature and jurisdiction, *Welsh's* case.

A man convict of conspiracy, perjury, or forgery is not a lawful witness. *Cempt. de pace regis 127. b. Dalt. cap. 111. (z)* but if he be pardoned, it seems he may be a witness.

And thus far concerning the capacity or incapacity of the witnesses.

2. In relation to the manner of their testimony, the opinion in *Dyer* of a witness by hearsay 1 *Mar. Dy.* 99. b. was rejected by all the judges in the lord *Lumly's* case, H. 14 *Eliz. Co. Pla. Cor.* 25. but if it be a hearsay from the offender himself confessing the fact, such a testimony upon hearsay makes a good witness within the statute.

Tho information upon oath taken before a justice of peace may make a good testimony to be read against the offender in case of

(y) *N. Edit. cap. 164. p. 544*

(z) *p. 542.*

felony,

felony, where the witness is not able to travel, yet in case of treason, where two witnesses are required, such an examination is not allowable, for the statute requires, that they be produced upon the arraignment in the presence of the prisoner to the end that he may cross examine them.

And thus much concerning the statutes in the time of *Edward VI.* and evidence upon indictments, I shall only add this.

In civil actions, as trespass against *A. B.* and *C.* if no evidence be given against any one to prove him guilty, he may be examined on the part of the defendant, and stands as a competent witness; and I see no reason, why if two or three persons be [307] indicted, and no evidence given against one or more of them, but that he may be a witness for the other; but otherwise it is, if there be but a colourable evidence against him (†).

(†) Our author should here have proceeded to his fourth general head, and have shown, what would be a confession within this statute of 5 & 6 Ed. 6. cap. 11. but probably he thought that sufficiently done by the second resolution in Tonge's case mentioned by him, p. 304.

CHAP. XXV.

*Concerning treasons declared and enacted from 1 Mar. till this day,
viz. 13 Car. 2.*

I COME to the statutes concerning treason in the times of queen *Mary*, queen *Elizabeth*, and so downwards.

The first statute in this period is 1 Mar. cap. 1. consisting of three clauses.

1. "That no act, deed or offense being by act of parliament made treason, petit treason, or misprision of treason, by words, writing, cyphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprision of treason, but only such, as be declared and expressed to be treason, petit treason, or misprision of treason, in or by the act of parliament of 25 E. 3. touching treason or the declaration of treasons, and none other, nor that any pains of death, penalties, or forfeitures in any wise ensue or be to any offender or offenders for doing or committing any treason, petit treason, or misprision of treason, other than such

“ such as be in the said act ordained and provided, any statute made
 “ before or after the said 25th year of *Edward III.* or any declaration
 “ or matter to the contrary notwithstanding.

2. “ That no advantage be given by this act to any person arrested
 “ or imprisoned for treason, petit treason, or misprision of treason the
 “ last day of *September* last past, or heretofore indicted or outlawed,
 “ or attainted of treason, &c. or excepted out of the queen’s pardon.

3. “ That all offenses made felony, or appointed to be within the
 “ case of *præmunire* by any statute since the first day of the first year
 “ of king *Henry VIII.* (not being felony or within the case of *præ-
 munire* before) and all and every branch, article, clause mentioned
 “ or declared in the same statutes concerning making of any offense
 “ felony, or within the case of *præmunire*, and all pains and forfeitures
 “ concerning the same, or any of them, shall be from henceforth
 “ void and repealed.”

This excellent law at one blow laid flat all those numerous treasons,
 misprisions, &c. at any time enacted since 25 *E. 3.* and all felonies
 and *præmunires* enacted in or after 1 *H. 8.*

As touching the first of these.

1. Hereby all those numerous treasons newly enacted in any former king’s time since 25 *E. 3.* a catalogue of most of which is before given, are wholly taken away.

2. Hereby all those treasons, that were declared treasons, so far forth as those treasons had their strength from such declarations, and were not really within the statute of 25 *E. 3.* are wholly taken away, and left purely to be determined according to the statute of 25 *E. 3.* and so far forth and no farther, than that statute warranteth.

And therefore the declaration of 3 *R. 2.* touching the killing of an ambassador, namely *John Imperiall*, the declaration of 3 *H. 5.* concerning clipping and impairing of coin, the declaration of *Mortimer’s* treason in breaking prison 2 *H. 6.* and all others of that kind are now wholly put out by this statute, *Coke* upon the statute *de fran-*
 gentibus prisonam (a), tho it is true, that it appears by 1 &
 [309] 2 *P. & M. cap. 11.* they thought that clipping and impairing of money had remained treason by the declarative law of 3 *H. 5.* but the statute of 5 *Eliz. cap. 11.* hath declared the contrary, and put that out of question.

(a) 2 *C. I. 590.*

3. But it repeal'd not the forfeitures for old treasons, tho' those forfeitures were enacted by statutes made after 25 E. 3. and therefore the forfeiture of estates-tail for treason given by 26 H. 8. continues notwithstanding this statute, *Co. P. C. p. 19.* and so it was resolved by all the judges of *England* in the lord *Sheffield's* case (*), *Stampf. 187. b. 12 Eliz. Dy. 289.* the reason is before given, *cap. 23. p. 241.* for the relation of the repealing clause is only to *treasons* not contained in 25 E. 3. not to *forfeitures* not contained in 25 E. 3. for indeed 25 E. 3. creates no forfeitures, but only declares what the common law was, and enacts no farther touching forfeitures.

4. But this act did not meddle with those new laws, that directed special proceedings, trials, &c. or other matters of that nature relating to treason, but that was done after by 1 & 2 P. & M. cap. 10. *de quo posita.*

5. The preamble is very considerable, which takes notice of the severity of former statutes, that made words only without other fact, or deed, to be high treason, which was one of the causes of this general repeal.

Touching the second clause, as is before observed in the precedent chapter, the repeal by 1 Mar. had discharged all offenses committed before that repeal against the statutes repeal'd, if it had not been specially provided to the contrary by the proviso of this act touching persons formerly indicted.

Now as to the third clause, it also took away all new felonies made since the first day of the reign of *Henry VIII.* but whether either of these clauses of repeal did take away those previous punishments, which for the first offense was made forfeiture of goods, and the second or third offense made treason, whether, I say, this statute took away those penalties, which were less than felony or treason in the first or second offense, or only those punishments which were made treason or felony, may be a question; as for instance, that of [310] 1 E. 6. cap. 12. the 5th clause, which makes certain offenses by words punishable with forfeiture of goods for first offense, loss of profits of lands for second offense, and treason for the third offense; whether this statute extends to successors, and (tho' the penalty of treason for the third offense be repeal'd by this act) whether the penalties for the first and second offenses be repeal'd, seems to me doubtful; I rather think they are not.

(*) *Palm. 351. W. Jones 8y.*

And

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And now this act having laid all former new treasons, felonies, and misprisions flat, and reduced all to the standard of 25 E. 3. the necessity of state and public peace puts the queen and her parliament nevertheless to begin new provisions.

1 Mar. Jeff. 2. cap. 6. " If any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the queen, her heirs or successors, or if any person do falsely forge or counterfeit the queen's sign manual, or privy signet, or privy seal, then every such offense shall be adjudged high treason, and the offenders, their counsellors, procurers, aiders and abettors judged traitors against the queen, her heirs and successors, and suffer and forfeit as in high treason."

Concerning this statute much hath been said before.

1. It is a perpetual act, and not personal only to the queen; for as the word *king* may include a successor, so the word *queen* may include a succeeding king or queen, and that it was so intended here is apparent by the words in the conclusion *shall be adjudged traitors against the queen, her heirs and successors*; and accordingly it hath been often resolved.

. 2. That the foreign coin (the counterfeiting whereof is made treason by this act) must be such, as is so made current by proclamation, for by the statute of 17 R. 2. cap. 1. foreign coin is not to run in payment in *England*, and therefore there must be an act under the great seal, as all proclamations ought to be, before it can be current within this statute: *vide accordant statut. 5 Eliz. cap. 11. and 18 Eliz. cap. 1.*

3. It must be a counterfeiting of that foreign coin, which [311] is stamped in *gold or silver*, viz. the greatest part gold, or the greatest part silver, for *denominatio fit a majore parte*; therefore if there be a foreign coin of copper, or brass and copper, it is not within this statute, but it is not necessary, that the counterfeit of it must be gold or silver, for if that be copper gilt, or alchymy after the similitude of foreign coin of gold or silver, it is within this act, because the prototype is a coin of gold or silver.

1 Mar. Jeff. 2. cap. 12. The act against riotous assemblies is the very same in substance with that of 3 & 4 E. 6. cap. 5. only changing treason into felony within clergy, and *nota bene* the power given to suppress such assemblies by force, and indemnifying the suppressors,

tho

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tho some of the rioters be killed: this act was continued by 1 Eliz. cap. 16. during that queen's life and till the next session after, and then expired (*b*).

1 & 2 P. & M. cap. 3. "If any person shall maliciously and of his own imagination speak any false, seditious and flanderous news, rumors, sayings, or tales, of the king or queen, then the person being convict and attainted, as in the act is expressed, shall be set upon the pillory and have both his ears cut off, unless he pay one hundred pounds, and suffer three months imprisonment; and if it be of the reporting of any other, then to stand on the pillory and lose one of his ears, unless he pay one hundred marks within one month after judgment, and suffer one month's imprisonment.

"And if any shall maliciously devise, write, print, or set forth any writing containing any false matter of flander, reproach, or dis-honour to the king or queen, or to the encouraging, stirring or moving of any insurrection or rebellion within this realm or the dominions thereof, or shall procure the same to be written, printed, or set forth (the said offense not being punishable as treason within the statute of 25 E. 3.) the offender shall for the first offense have his right hand stricken off.

"The second of any of these offenses after a former conviction is made punishable with loss of goods and perpetual [312] imprisonment: justices of assize, &c. shall have power to hear and determine offenses, &c. and to commit persons suspected without bail; no person impeachable for words, unless convict within three months after the offense: peers to be tried by their peers."

Upon this act these things are observable: 1. That the law-makers did not take seditious words to be within the statute of 25 E. 3. for then they would have added the same clause as in the other case, *viz.* (*not being treason within the Statute of 25 E. 3.*) Again, 2. That they did take it, that some seditious writings might be treason within the statute of 25 E. 3. for it is an overt-act, as hath been formerly observed (*t*). 3. That as some writings exciting insurrection might be treason within the statute of 25 E. 3. so some writings, that might possibly by construction have the same effect, might not be within that statute, for the law-makers cannot be supposed to intend to make any thing, that was treason within the statute of 25 E. 3. to be less than

(*b*) But a new act to much the same purpose was made 1 Geo. I. cap. 5. which is perpetual.

(*t*) p. 142.

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treason; and by consequence and consequential illation many things might by a witty advocate be construed and heightened to be to move insurrection and rebellion, which immediately, and in their own nature, nor in the intention of the writer, were never so intended; this statute died with the queen, but was revived 1 Eliz. cap. 6: during that queen's life.

1 & 2 P. & M. cap. 9. " If any by express words or sayings.
" have prayed, or shall pray, that God would shorten the queen's
" life, or take her out of the way, or any such like malicious prayer
" amounting to the same effect, they, their procurers and abettors
" shall be adjudged traitors.

" But as to any the offenses aforesaid perpetrated during that session
" of parliament, if the offenders shall shew themselves penitent
" upon their arraignment, no judgment of treason shall be given
" against them, but a lesser punishment may be inflicted.

So that they took not this to be a treason within the
[313] statute of 25 E. 3. neither is it thought to be a very great
offense, for it is an appeal to God, who we are sure is not
moved by such wishes and prayers contrary to his own command,
Thou shalt not curse the ruler of thy people, Exod. xxxii. 28.

1 & 2 P. & M. cap. 10. consisteth of several remarkable clauses.

1. " If any during the marriage between the king and queen
" shall imagine to deprive the king from having jointly with the
" queen the style, honor, and kingly name of the realms and do-
" minions belonging to the queen, or to destroy the king during the
" matrimony, or to destroy the queen, or the heirs of her body,
" being kings or queens of this realm, or to levy war within the
" realm or marches of the same against the king during the mar-
" riage, or against the queen or any of her said heirs, kings or
" queens of this realm, or to depose the queen or the heirs of her
" body kings or queens of this realm from the imperial crown of
" this realm, and the said compassings maliciously, advisedly and
" directly shall utter by open preaching, express words or sayings,
" or if any person by express words shall maliciously, advisedly, and
" directly declare or publish, that the king during the marriage ought
" not to have jointly with the queen the style, honor and kingly name
" of this realm, or that any person, being neither the now king or
" queen, during the marriage between them ought to have the style,
" honor and kingly name of this realm, or that the now queen is
" not

“ not, or of right ought not to be queen of this realm, or after her
 “ death the heirs of her body, being kings or queens of this realm,
 “ ought not so to be or to enjoy the same, or that any person;
 “ other than the queen during her life, or after death, other than the
 “ heirs of her body, as long as one of the heirs of her body,
 “ shall be in life, ought to be queen or king of this realm, then
 “ every such offender shall lose to the queen all his goods and
 “ chattles, and forfeit the issues of his lands during his life, and
 “ have perpetual imprisonment; the second offense after a former con-
 “ viction shall be treason.

2. “ And if any by writing, printing, overt-act, or deed
 “ shall maliciously, advisedly and directly utter the things [314]
 “ aforesaid, then they, their abettors, procurers, counsellors, aiders,
 “ and comforters knowing the said offense to be done, and being
 “ thereof convicted and attainted by the laws and statutes of this
 “ realm, shall be adjudged high traitors, and forfeit their goods, lands
 “ and tenements to the queen, her heirs and successors, as in case
 “ of high treason.

3. “ Provision for the government of the queen’s children.

4. “ If any person, during the time that the king shall have the
 “ ordering of the queen’s children, shall compass to destroy the king,
 “ or to remove him from the government of the said children, it
 “ shall be treason.

5. “ That all trials hereafter to be had, awarded or made for any
 “ treason, shall be had and used only according to the due order
 “ and course of the common laws of this realm, and not otherwise,
 “ saving to all persons, (other than the offenders and their heirs,
 “ and such persons as claim to any of their uses,) all such rights,
 “ titles, interests, possession, leases, &c. which they had at the day
 “ of the committing of such treasons, or at any time before, as if
 “ this act had never been made.

6. “ Concealment of any high treason shall be adjudged only mis-
 “ prision of treason, and to forfeit and suffer as in case of misprision
 “ notwithstanding this act.

7. “ Trial by peers is saved in treason or misprision of treason.

8. “ None to be impeached for words, unless indicted within six
 “ months after the offense.

9. “ Witnesses examined to or deposing any treasons in this act,
 “ or at least two of them shall be brought forth before the party

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" arraigned, if he require the same, and say openly in his hearing
" what they can say against him concerning the treasons in the in-
" dictment, unless the party arraigned shall willingly confess the same
" upon his arraignment.

[315] 10. " In all cases of high treason concerning coin current
" within this realm, or counterfeiting the king's or queen's
" signet, privy seal, great seal, or sign manual, such manner of trial,
" and no other, shall be observed and kept, as heretofore hath been
" used by the common laws of this realm, any law, statute or other
" thing to the contrary notwithstanding.

" The counsellors, procurers, comforters, and abettors for the first
" offense to suffer as the principal in the first offense, and procurers,
" comforters, and abettors for the second offense to forfeit as the
" principal in the second offense."

This statute for so much as concerns the forfeiture or punishment
inflicted for words, &c. and likewise the treasons newly
enacted was but temporary, and died when the queen died without
issue.

But there is still observable,

1. The great distinction, that was used between words and writing ;
those very things, which written were made in the first offense *treason*, being only spoken were in the first offense *but misdemeanor*, altho many of the words there mentioned sounded high, as namely
that the queen is not or ought not to be queen, but some person else,
whereby we may gather the opinion of parliaments in those times,
that regularly words, tho of a high nature, were not treason, nor
an overt-act of compassing the king's death.

The second thing observable is, that here are some treasons newly
enacted, which yet were treasons within 25 E. 3. as compassing
to destroy and depose the queen, and declaring the same by writing
or overt act ; and therefore this clause was omitted in the statute of
1 Eliz. cap. 6. and left to the statute of 25 E. 3.

The 3d thing observable herein is, that the queen's husband is
not within the act of 25 E. 3. therefore it was necessary to have an
act of parliament for the securing of him, who was only the queen's
husband.

4. That tho there was a communication of the regal title to the
queen's husband, yet even that could not have been but by act of
parliament,

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parliament, and yet no more is communicated, but the title and name, not the authority and rule of a king of *England*.

The fifth clause concerning restoring of trial of treason according to the course of the common law is of great consequence and use, and is perpetual.

1. By this clause of the statute as to the case of high treason, the statutes of 27 E. 3. cap. 8. 28 E. 3. cap. 13. 8 H. 6. cap. 29. for trial of an alien *per medietatem linguae* are wholly repealed, and the trial shall be by *Englishmen*, 1 Mar. Dy. 144. *Shirly's case*, *H. 36 Siz.* Dr. *Lopez's case* ruled *per omnes justiciarios*. *Co. P. C p. 27.*

2. The trial of a lunatic without issue joined by 33 H. 8. cap. 20. and in a foreign county by 33 H. 8. cap. 23. and for treasons in *Wales* 26 H. 8. cap. 6. 32 H. 8. cap. 4. are all repealed by this statute. *Co. P. C. p. 24, 27.*

3. But whether the statute of 1 E. 6. and 5 & 6 E. 6. concerning two witnesses be hereby repealed *vide supra p. 298.* only the 9th and 10th clauses of this statute seem strongly to imply, that this statute intended the repeal of it, for otherwise why should that special provision be added in this statute, for at least two of the witnesses formerly examined to repeat their testimony to the prisoner, if he desires it, when the statute of 5 & 6 E. 6. had more effectually provided for the same thing.

4. But the statute of 28 H. 8 cap. 15. concerning the trial of treason committed upon the high sea is not repealed, nor the statute of 35 H. 8. cap. 2. for trials of treasons out of the realm, because there was no way regularly appointed at common law for the trial of those treasons being done out of the bodies of counties; but it seems the trial of treasons committed in any place in rivers, or parts within the bodies of counties, tho the admiral claimed jurisdiction there, is restored to the common law, where it was originally triable.

Neither doth the act extend to petit treason, for treason generally spoken is intended of high treason; therefore the trial, as to that, stands in the same manner, as it was before the making of that act.

5. Peremptory challenge in case of high treason is restored [317] by this act, and the statute of 33 H. 8. cap. 23. as to that point repealed, *vide accordant Co. P. C. p. 27. & libros ibi*; so that

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at this day he may challenge thirty-five, *viz.* under three juries peremptorily. *Co. P. C. ibidem.*

1 & 2 P. & M. cap. 11. " Whosoever shall bring from the parts beyond sea into this realm, or into any of the dominions of the same, any false and counterfeit money, being current within this realm by the sufferance and consent of the queen, knowing the same coin to be false and counterfeit, to the intent to utter or make payment with the same within this realm, or any of the dominions of the same, by merchandizing or otherwise, the offenders, their counsellors, procurers, aiders and abettors in that behalf, shall be adjudged offenders in high treason, and after lawful conviction shall suffer and forfeit, as in cases of high treason.

" If any be accused or impeached of any offense within this statute, or of any other offense concerning the impairing, forging, or counterfeiting any coin current within this kingdom, he shall be indicted, arraigned, tried, convicted, or attainted by such like evidence, and in such manner and form, as hath been used and accustomed within this realm before the first year of the reign of *Edward VI.* any law, statute &c. to the contrary notwithstanding."

Upon this statute several things are observable:

1. That the foreign coin in this case must be such, as is made current in this realm by the consent of the queen, which cannot be without proclamation by writ under the great seal, as hath been before said p. 213 & 310.

2. That the party, that brings it in, must know it to be counterfeit.

3. That it must be brought into the king's dominions from some place, that is out of the king's dominions, and therefore the importation out of *Ireland* is held not to be an importation within this statute, for that is within the dominions of this realm, tho' not within the realm. 3 H. 7. 10. & *vide supra* cap. 20 p. 225. *Co. P. C.* p. 18.

4. It must be brought with an intent to merchandize or [318] make payment within this realm, and this intent may be tried by circumstances, tho' the offender hath not yet actually made payment or merchandize with it: *vide antea* p. 229.

5. This is a new law, for the statute of 4 H. 7. cap. 18. whereby it was formerly enacted, is repealed by 1 Mar. cap. 1.

6. It is a law perpetual, tho' it speaks only of coin made current by the consent of the king and queen our sovereign lord and lady, and so it hath been still taken.

7. That

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7. That at this time it was taken, that impairing of the coin current within this realm was treason as to the proper coin of this realm by force of the declarative law of 3 H. 5. cap. 6. and that this was not repealed by 1 Mar. cap. 1. for there was no other law in force newly enacted for making impairing of the coin treason between 1 Mar. cap. 1. and 1 & 2 P. & M. cap. 11. but this error is reformed by the declaration of 5 Eliz. cap. 11.

8. That without any difficulty in the case of counterfeiting coin current in this kingdom there is no necessity of two witnesses, neither upon the trial nor upon the indictment, so that questionless, as to this treason, the clause of the statutes of 1 and 5 E. 6. concerning two witnesses is wholly repealed, for the statute saith, he shall be indicted, &c. the omission of which word in the general clause of 1 & 2 P. & M. cap. 10. which concerns treasons in general, is that which gave the great countenance to that opinion of my lord Coke, that in other treasons there must be two witnesses upon the indictment, tho that statute, as to the trial, reuniteth the course of the common law.

I come now to the time of queen Elizabeth.

The statutes, that concern treason, I shall range in three ranks: 1. Such as more immediately concern the safety of the queen's person. 2. Such as concern the money of the kingdom. 3. Such as concern the safety of the queen's government in relation to papal usurpations and matter of religion.

I. I begin with the first rank, such as concern more immediately the safety of the queen's person.

1 Eliz. cap. 5. The statute of 1 & 2 P. & M. cap. 10. [319] is recited, and that that statute extended only to queen Mary and the heirs of her body, the very same statute in effect is enacted over again, only with an application thereof to queen Elizabeth, and the heirs of her body, and almost all the same clauses are over again, except that which concerns the trial of treason according to the common law, and the clause of compassing to destroy the queen, and manifesting the same by writing or overt-act; two witnesses are required to the indictment and arraignment of the prisoner: this act expired upon the queen's death without issue.

1 Eliz. cap. 6. The statute of 1 Mar. sess. 2. cap. 3. concerning seditious and false rumours is revived, as in relation to queen Elizabeth, under the same pains and penalties, as are therein contained, as

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tho the same act had extended to the heirs and successors of queen *Mary*, any doubt to the contrary notwithstanding ; but this was personal to the queen and the heirs of her body, and was repealed by 23 *Eliz. cap. 2.*

13 *Eliz. cap. 1.* “ If any person during the natural life of the “ queen shall, within the realm or without, compass or imagine the “ death or destruction, or bodily harm tending to death or destruction, “ maiming or wounding of her person, or to deprive or depose her “ from the style, honour, or kingly name of the crown of this realm, “ or of any other realm or dominion belonging to her majesty, or to “ levy war against her majesty within the realm or without, or to “ move or stir any foreigners with force to invade this realm, or any “ other her majesty’s dominions being under her obeysance, and such “ compasses, imaginations, devices, or intentions, or any of them “ shall maliciously, advisedly, and directly publish, hold opinion, “ affirm or say by any speech, express words or sayings, that the “ queen during her life is not, or ought not to be queen of this “ realm of *England*, and also of *France* and *Ireland*, or of any other “ her majesty’s dominions being under her obeysance during her life, “ or shall by writing, printing, preaching, speech, express words or [320] “ sayings, maliciously, advisedly, and directly publish and “ affirm, that the queen is an heretic, schismatic, tyrant, “ infidel, or usurper of the crown, every such offense shall be taken, “ deemed, and declared by authority of this parliament to be high “ treason ; and the offenders, their abettors, counsellors and procur- “ ers, and the aiders and comforters of the same offenders, knowing “ the same, being indicted, convicted, and attaint according to the “ usual order and course of the common law, or according to the act “ of 35 *H. 8.* for trial of treasons out of the realm, shall be deemed “ traitors, and suffer and forfeit as traitors.

2. “ If any person of any condition, place, or nation during the “ queen’s life pretend, utter, or publish themselves, or any of them, “ or any other, than the now queen, to have right to enjoy the “ crown of *England* during the now queen’s life, or shall during the “ queen’s life usurp the crown, or the royal title, style or dignity of “ the crown of *England*, or shall during the queen’s life, hold, or “ affirm, that the now queen hath not right to hold the said crown, “ realm, style, title, or dignity, or shall not, after demand made on “ the behalf of the queen, acknowledge effectually, that the now “ queen

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“ queen is true and rightful queen of this realm, they shall be disabled
“ during their natural lives only to enjoy the crown by succession
“ after the queen’s death, as if such person were naturally dead.

3. “ If any person shall during the queen’s life hold or affirm a
“ right, interest or succession to the crown to be in any such claimor,
“ usurper, or pretender, or not acknowledger after notification by
“ proclamation of such claim, usurpation or pretense, such person
“ shall suffer as a traitor.

4. “ If any shall maintain, that the common laws, not altered by
“ parliament, ought not to direct the right of the crown of *England*,
“ or that the queen [*Elizabeth*] with and by the authority of par-
“ liament is not able to make laws of sufficient force to limit and
“ bind the crown of *England*, and the descent, limitation, inherit-
“ ance, and government thereof, or that this statute, or any statute
“ to be made by authority of parliament with the queen’s royal assent
“ for the limiting of the crown to be justly in the queen’s [321]
“ person is not, or ought not to be of sufficient force to bind,
“ limit, restrain, and govern all persons, their rights and titles, that
“ in any way might claim an interest, or possibility in or to the crown
“ of *England* in possession, remainder, inheritance, succession, or
“ otherwise, every such person so holding, affirming or maintaining
“ during the queen’s life shall be judged a high traitor, and every
“ person so holding after the queen’s death shall forfeit all his goods
“ and chattles.

5. “ If any by writing or printing declare, before the same be de-
“ clared and established by act of parliament, that any particular
“ person ought to be right heir to the queen (except the natural issue of
“ her body) or that shall print, set up, or sell such book, for the first
“ offense he shall suffer one year’s imprisonment, and forfeit half his
“ goods, and for the second offense it shall be a *præmunire*.

6. “ Trial of a peer by his peers is saved.

7. “ Saves the right of all, other than the offenders and their heirs,
“ claiming only as heir to the offender.

8. “ Offender within the queen’s dominions shall be indicted with-
“ in six months, and out of the dominions within twelve months.

9. “ No person to be arraigned for any offense within this act;
“ unless it be proved by the testimony, deposition, or oath of two
“ lawful and sufficient witnesses, who shall at the time of the arraign-
“ ment of such person be brought before the party offending face to

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" face, and there declare all they can say against the party arraigned,
" unless the party arraigned shall without violence confess the same.

10. " The aider or comforter of such, as shall affirm the queen a
" schismatic, heretic, tyrant, infidel, or usurper, shall for his first
" offense, knowing the same to be committed, incur a *præmunire*,
" and for his second offense, after conviction of the former, shall be
" a traitor.

11. " Provided, that giving charitable alms in money, meat,
" drink, apparel or bedding for sustentation of the body, or health of
[322] " any offender in any offense, made treason or *præmunire*,
" during the time of his imprisonment, shall not be taken to
" be any offense."

Tho this act be antiquated by the death of queen *Elizabeth*, yet
there are (as in other acts of this nature that are expired) divers mat-
ters that are observable for the true understanding of the common
law, and therefore I have repeated many acts of this nature at large.

1. This act doth contain and enact some treasons as new treasons,
which certainly were treasons by the statute of 25 E. 3. as compassing
to destroy or depose the queen, and manifesting the same by writing,
printing, or overtact; but it was thought or at least doubted, that
manifesting the same barely by words were not within 25 E. 3. and
it appears by the preamble, that this act was made to take away some
doubts, as well as to provide new remedies.

2. It partly appears by this act, that the bare conspiracy to levy
war was not treason by the statute of 25 E. 3. without a war levied,
and accordingly it was resolved P. 39 *Eliz. Burton's case, Co. P. C.*
p. 10. and therefore we are to be careful not to apply all convictions
of treason in the queens time, as judgments declarative of the statute
of 25 E. 3. *de proditionibus*, because they were oftentimes indicted
upon this statute in the queen's time, and the general conclusion of
the indictment *contra formam statuti*, and sometimes generally *contra*
formam statut. with an abbreviation was applicable to any statute
then in force, which was most effectual to this purpose.

In *Anderson's reports*, part. 2. n. 2. (c), it appears that in 37 *Eliz.*
divers apprentices were committed for great riots, divers other appren-
tices conspired to deliver them out of prison, to kill the lord mayor of
London, to burn his house, to break open two houses near the *Tower*,
where there were arms for three hundred men, and to furnish them-

selves ; after which divers apprentices threw about libels moving others to join with them and to assemble at *Bunhill*, where divers to the number of three hundred assembled, where they had a trumpet and a cloke upon a pole instead of a flag, and as they were [323] going towards the mayor's house, they were met by the sheriffs and swordbearer, against whom the apprentices offered resistance.

It was resolved, that this was treason within the statute of 13 *Eliz.* for it was an intention to levy war, and altho they intended no harm to the person of the queen, yet because it concerned her in her office and authority, and was for such things, which the queen by law and justice ought to do, it was a levying war against the queen, and they were condemned and executed.

This proceeding was upon this statute, and yet perchance, the circumstances of the case wholly laid together, this might have been an actual levying of war within the 25 *E. 3.* but they thought it safer to proceed upon this statute.

3. That tho regularly words alone make not an overt-act of compassing of the queen's death, yet printing or writing may do it, *C. P. C. p. 12, 14.* and therefore an act of parliament was requisite to make it an overt-act ; yet observe how cautiously it is penned, *maliciously, advisedly, and directly, &c.* leaving as little, as possibly may be, to construction.

4. That defamatory words, tho of a very high nature, do not always make treason ; there cannot be more venomous words ordinarily thought of, than to say, the queen was an *heretic, schismatic, tyrant, usurper,* yet an act of parliament was necessary to make it treason.

5. That to make a man a principal in treason by comfort or aid after the offense committed it must be *knowingly*, and therefore I never thought that opinion of *Stamford, fol. 41. b.* to be law, that a receipt of a felon after attainer in the same county made a person accessory without notice, because he is bound at his peril to take notice, that he was attainted, for it oftentimes lies as little in the knowledge of many persons, who are convict or attainted of felony or treason, as whether a man be guilty of it : *vide tamen Dyer 355.*

6. That regularly in a new treason the aiding and comforting of the traitors, knowing them to be such, makes a man guilty of treason,

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son, and therefore here is care by express provision to make the first offense a *præmunire*.

[324] 7. Here is great care to disable the heir to the crown from succeeding, if he usurp during the queen's life; but tho all the care imaginable was there used, yet it hath been held, that by the accession of the crown to the person so disabled, all these disabilities have vanished, *vide 1 H. 7. 4. (d)*: see Mr. Plowden's learned tract touching the right of succession of Mary queen of Scotland.

8. *Nota* concerning the power of the king to limit the crown by consent of parliament.

9. That they took the statutes of 1 and of 5 & 6 E. 6. concerning two witnesses to be determined, or at least not to extend to treasons afterwards enacted, for otherwise there needed not this special care and provision *de novo* for two witnesses.

10. That as the aiding or comforting of one, that speaks seditious words, made treason on the second conviction, must be for the second offense, after a conviction of the former, so the second offense, tho committed after a former, is not treason, unless it be also committed after a former conviction: the like method is in forgery upon the Statute of 5 Eliz. cap. 14. and generally that exposition holds in most cases, where the second offense is subjected to a severer punishment than the former, for it is intended of such offense committed after the conviction of a former, *C. P. C.* 172.

11. It is provided that charitable relief shall not make a party guilty of treason or *præmunire*, as an aider or abetter: this was a necessary provision to avoid question.

Regularly relief by victuals or clothes of a felon or of a traitor, after he is in custody or under bail, makes not a man an accessary [325] in felony, nor a principal in treason; but if he help him to escape, that makes him an accessary in one case and a principle in the other, *Dalt. cap. 108. p. 286. (e)*, and with this

(d) The words of that book, are, *That the king was a person nōle and disbarred from any attainder eo facto, that he took upon him the government and the being king; so that it was not the bare accession or descent at the crown, but the being in actual possession of the regal government, which was construed to remove all disabilities; this easeth therefore no argument that the Statute of 13 Eliz. could not bar the right of the*

successor, and hinder him from succeeding, but only that if notwithstanding he should get possession of the government, that possession would purge all disabilities, which is just as much as to say, that he, who can get the power into his hands notwithstanding an attainder or act of parliament to the contrary, will not think himself bound by such attainder or act of parliament.

(e) *N. Edi. cap. 161. p. 531.*

agrees this proviso in the case of high treason; but *nota* it extends no farther than during the time of his imprisonment, yet the law is all one, if he be under bail, for he is *in custodiâ* still, for the bail are in law his keepers, and he, that is delivered to bail in the king's bench, is nevertheless said to be *in custodiâ marescalli*.

14 Eliz. cap. 1. " If any person do within this realm, or elsewhere unlawfully, and of his own authority compass, imagine, conspire, practise, or devise by any ways or means with force, or by craft maliciously and rebelliously to take, detain or keep from the queen any of her towers, castles, fortresses or holds, or maliciously and rebelliously take, burn or destroy them, having any of the queen's munition in them, or being appointed to be guarded with soldiers within the queen's dominions, and the same compassing do advisedly by express words or deeds utter and declare for any the malicious or rebellious intents aforesaid, it shall be adjudged felony in the offenders, their aiders, comforters, counsellors and abettors without clergy.

" If any shall with force maliciously or rebelliously detain from the queen any of her majesty's castles, towns, fortresses or holds within any of her dominions, or any of her ships, ordinance or artillery, or munition of war, and not render the same within six days after proclamation, or wilfully or maliciously burn or destroy any of her ships, or bar any of her havens, this shall be treason."

This act to continue during the queen's life.

We may see by this act, that the opinion of the parliament in that time was, that this conspiring to take forts or ships by force or deceit was not treason; but indeed the actual taking them by force was levying of war against the king by the statute of 25 E. 3.

But if a man detains the king's town, or castle, or ships, and when any commissionated by the king demands the same, and it is refused to be delivered, and thereupon the kings' commissioner raiseth [326] a power, makes an assault, and they within stand upon their guard, and repel force with force, this had been treason within the statute of 25 E. 3. for it is a levying war, and so not a bare detaining; *quod vide Co. P. C. p. 10. bis in eadem paginâ*.

Again, if this detaining the king's castle or fort, or the castle of any other be barely such and without assault, yet if it be in compliance with a foreign enemy, or in confederacy with him, this is treason within

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within the act of 25 E. 3. and an overt-act of adhering to the king's enemies; that therefore, which this act makes treason in detaining after proclamation, is a simple detaining without the concurrence of the circumstances above-mentioned, which was not treason before the making of this act.

14 Eliz. cap. 2. " If any person shall conspire, imagine, or go about unlawfully and maliciously to set at liberty any person committed by the queen's special command for any treason or suspicion of Treason concerning the person of the queen before indictment of the person imprisoned, and such imagination or conspiracy shall set forth, utter or declare by express words, writing, or other matter, it shall be misprision of treasons; but if the party imprisoned be indicted of any treason concerning the person of the queen, it shall be felony so to conspire and declare such conspiracy, *ut supra*.

" If it be after attainder or conviction, then such conspiracy so declared as aforesaid shall be high treason;" this act to last during the queen's life.

These things are observable upon this act, 1. Here is no provision against the actual discharge or setting at liberty, neither needed it, for if the party committed had really committed treason, this was treason even within the statute of 25 E. 3. but if it were only a commitment for treason, but no treason committed by the person in custody, such delivery was not treason, as appears before cap 22. But 2. The conspiracy to do this, tho manifested by open act, was neither treason, misprision of treason, nor felony; neither is it at [327] this day, but only a bare misdemeanor punishable by fine and imprisonment, tho the party imprisoned were indicted, yea attainted. And 3. This act extends only to such treasons as concerned immediately the queen's person, not to treasons touching her seal or coin.

And these are all the acts, that were made in the queen's time touching treasons, which more especially related to the safety of her person, all which expired at her death.

II. I come to those treasons, which were enacted in the queen's time concerning coin, and they are three.

5 Eliz. cap. 11. " Makes the filing, washing, rounding, and clipping of the coin of this realm, or foreign coin made current by proclamation,

" proclamation, for lucre or gain, and their counsellors, confessters,
" and aiders to be high treason by virtue of this act."

14 Eliz. cap. 3. " Makes the counterfeiting of foreign coin of
" gold or silver, not current within this realm, misprision of treason
" in the offenders, their procurers, aiders and abettors."

18 Eliz. cap. 1. " Makes the impairing, diminishing, falsifying,
" scaling or lightning of the coin of this kingdom or foreign coin
" made current by proclamation for lucre-sake to be high treason
" in the offenders, their counsellors, confessters and aiders."

But of these sufficient hath been said before in the busines of
money, forfeiture and upon the statutes of 1 and 5 & 6 E. 6. The
sum of which is this :

1. That the treasons made by the acts of 5 and 18 Eliz. are new
treasons, newly made by virtue of this act, and every body is estopped
to say the contrary by reason of the special recital and penning
of this act, *viz. shall be adjudged treason by virtue of this act.*

2. That the foreign coin, the clipping and impairing whereof is
made treason by this act, must be such as is made current by procla-
mation, for it cannot be otherwise current by reason of the pro-
hibition of the statute of 17 R. 2. cap. 1. and also, the word *pro-
clamation* in those acts refer to foreign coin so legitimated by pro-
clamation, not to the proper coin of this kingdom, which needs not
a proclamation to legitimate it.

3. The trial and whole proceeding is to be according to [328]
the course of the law by the express words of these acts and
of 1 & 2 P. & M. cap. 11. and therefore there need not two wit-
nesses required by the acts of 1 and the 5 & 6 E. 6.

4. Not only the offenders themselves, but the counsellors, con-
fessers and aiders are within those acts; but altho regularly in case
of any old or new treason made, the comforters and receivers of the
offender are impliedly guilty of treason by a kind of necessary con-
comitance, yet it seems to me by the special penning of this act, it
extends only to counsellors, aiders and confessers (according to the
resolution in *Conyer's case*, Dy. 296.) as to the offenses made treason
by those acts, tho possibly it may be treason, as to the receiver of
a counterfeiter within the statute of 25 E. 3. according to my lord
Coke's opinion, Co. P. C. cap. 64. p. 138. for that is an old trea-
son, and no such restriction by express words to counsellors, aiders
and confessers.

5. The

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5. The clipping and impairing, that makes treason within these acts, must by the express words of the act be *for gain or lucre*, and so laid in the indictment.

6. Counterfeiting of coin not current to bring it within a *præmiser* by the statute of 14 Eliz. cap. 3. must be a counterfeiting of such foreign coin, as is of gold or silver, or consists thereof for the greatest part, and extends not to the foreign copper, or leather coin.

7. No corruption of blood or loss of dower are to be by attainders of these treasons.

III. Therefore I come to the third sort of statutes made in this queen's time, which relate to the queen's government, and especially in relation to papal usurpation.

1 Eliz. cap. 3. is an act of recognition of the queen to be rightful sovereign of this realm, and all acts repugnant thereunto are repealed; and cap. 1. the oath of supremacy is enacted to be taken by the persons therein described: the tenor of which oath followeth in these words, *viz.*

“ I A. B. do utterly testify and declare in my conscience, that the [329] “ queen's highness is the only supreme governor of this realm, and of all other her highness's dominions and coun-“ tries, as well in all spiritual or ecclesiastical things or causes, as “ temporal, and that no foreign prince, person, prelate, state, or “ potentate hath or ought to have any jurisdiction, power, superiority, “ preeminence or authority, ecclesiastical or spiritual within this “ realm, and therefore I do utterly renounce and forsake all foreign “ jurisdictions, powers, superiorities and authorities, and do promise, “ that from henceforth I shall bear faith and true allegiance to the “ queen's highness, her heirs and lawful successors, and to my “ power shall assist and defend all jurisdictions, privileges, preemi-“ nences and authorities granted or belonging to the queen's highness, “ her heirs and successors, or united and annexed to the imperial “ crown of this realm.” So help me God and by the contents of this book. (f)

Every person appointed to take the oath, and refusing, shall lose his offices and benefices, and be disabled to take any office or benefice, &c. and then proceeds to other penalties upon refusals.

(f) This oath, and this statute so far as relates to the said oath, are abrogated by a W. & M. cap. 8.

And

And by that act it is enacted, " That if any person inhabiting
 " within the queen's dominions shall by writing, printing, teaching,
 " preaching, express words, deed or act advisedly, maliciously, and
 " directly affirm, hold, stand with, set forth, maintain, or defend
 " the authority, preeminence, power or jurisdiction spiritual or eccl-
 " esastical of any foreign prince, prelate, person, state or potentate
 " whatsoever, heretofore claimed, used or usurped within this realm,
 " or any dominion or country under the queen's obeysance, or shall
 " advisedly, maliciously, and directly put in ure, or execute any
 " thing for the extolling, advancement, setting forth, maintenance,
 " or defence of any such pretended or usurped jurisdiction, power,
 " preeminence or authority, or any part thereof, every person so
 " offending, his abettors, aiders, procurers and counsellors, being
 " convicted according to the course of the common law, shall
 " for the first offense forfeit his goods and chattles, and, if
 " not worth twenty pounds, shall also suffer a year's im. [330]
 " prisonment, and all his ecclesiastical benefices and dignities shall
 " be void, and for a second offense committed after attainer of the
 " first shall be within penalty of *præmunire*, and for the third of-
 " fense committed after his second conviction, it shall be adjudged
 " high treason."

None to be impeached for words only, unless indicted within a year after the offense committed ; and if imprisoned, to be set at liberty, unless indicted within half a year after the the offense : trial of a peer by peers.

None to be indicted, &c. without two witnesses, which if living shall be brought face to face before the prisoner upon his arraignment, and testify what they can say, if the prisoner require it.

Giving of relief, aid or comfort to offenders shall not be punishable, unless proved by two witnesses, that he had notice of the offence at the time of such relief given.

5 Eliz. cap. 1. " If any person dwelling, inhabiting, or resiant
 " within the queen's dominions or under her obeysance, shall by
 " writing, cyphering, printing, preaching, deed or act, advisedly
 " and wittingly hold, or stand with, to extol, set forth, maintain or
 " defend the authority, jurisdiction, or power of the bishop of *Rome*,
 " or his see, heretofore claimed, used, or usurped within this realm,
 " or any dominion or country under the queen's obeysance, or by
 " speech, open act or deed advisedly and wittingly attribute any such
 " manner

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“ manner of jurisdiction, authority, or preeminence to the said see
“ or bishop of *Rome* for the time being within this realm or any
“ the queen’s dominions, then every such person, their procurers,
“ abettors and counsellors, and also their aiders, comforters and as-
“ sistants upon the purpose aforesaid, to extol the authority of the
“ bishop of *Rome*, being lawfully convicted within one year shall
“ incur a *præmunire*.

It directs who shall take, and give the oath of supremacy.

Any person appointed to take this oath by this statute or the
[331] statute of 1 *Eliz.* who shall refuse to take the same, being
thereof lawfully indicted within one year, and convict or
attaint at any time after, shall incur a *præmunire*, 16 *R. 2.*

Certificate of refusal to be made into the king’s bench within
forty days after refusal; the king’s bench may proceed to indict the
party refusing within a year by a jury of the same county, where the
court sits.

If any person convict of the offenses within the first clause of the
statute shall after conviction thereof do the said offenses or any of
them, or if any person appointed to take the oath, do after three
months after the first tender refuse to take the same being tendered
a second time, the offender shall suffer as in case of high treason.

Attainder of treason upon this act shall not make corruption of
blood, disinherit the heir, or forfeit dower.

Members of the house of commons shall take the said oath, other-
wise shall be disabled to sit.

Temporal lords of parliament shall not be bound to take the oath,
nor subject to the penalties for refusing the same.

The charitable giving of reasonable alms to an offender without
fraud or covin shall not be construed an abetting, counselling, aiding,
afflicting, procuring or comforting of an offender within this
act: peers indicted shall be tried by peers, as in other cases of treason.

No person compellible to take the oath upon second tender, but
such as have ecclesiastical preferments, or such as have offices in
ecclesiastical courts, or such as refuse wilfully to observe the orders
established for divine service, or such as shall deprave the rites and
ceremonies of the church of *England*, or that shall say or bear pri-
vate mass,

Not lawful to kill person attaint in *præmunire*.

No

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No person to be indicted for aiding, assisting, comforting, abetting any person for extolling the power of the bishop of *Rome*, unless accused by such lawful proof, as shall be thought by the jury sufficient to prove him guilty of the offence.

The things observable upon this act,

1. Tho the indictment for the refusal of the oath upon the first tender may be in the county, where the king's bench sits, yet the trial must be by a jury of the county where the refusal is, *6 & 7 Eliz. Dy. 234. a Bonner's case.* [332]

2. If books extolling the pope's jurisdiction be written beyond sea and brought in hither, it was ruled by the advice of all the judges, 1. The importer, that delivers them out to extol the pope's authority. 2. He that reads them, and in conference with others allows them to be good, 3. He that hears the contents, and in open speech with others commend and affirm them to be good. 4. He that hath such books in his custody, and secretly conveys them to his friends to the intent to perswade them to be of that opinion. 5. He that prints such books in this realm, and utters them, are within the first clause of this statute against extolling of papal authority; but those that receive and read them without allowing them in conference, are not within this act.

3. An indictment against an aider, &c. must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope, and *contra formam statuti* only, is not sufficient. *Dy. 363: a.*

4. Note this special clause of giving alms not to make an aider or comforter, if the alms be reasonable, and without covin, tho the offender not imprisoned, nor under bail, seems to be but agreeable to the common law; *vide quæ supra dicta sunt super statutum 13 Eliz. cap. 1.* and therefore it seems, even by the common law, if a physician or chirurgeon minister help to an offender sick or wounded tho he know him to be an offender, even in treason, this makes him not a traitor, for it is done upon the account of common humanity, not *intuitu criminis vel criminosi*; but it will be misprision of treason, if he know it, and do not discover him.

23 Eliz. cap. 1. "All persons whatsoever, who have or shall have " or pretend to have power, or shall any way put in practice to " absolve, perswade, or withdraw any of the queen's subjects, or " any within her dominions from their natural obedience to her " majesty, or to withdraw them for that intent from the religion
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“ now by her highness’s authority established within her highness’s
[333] “ dominions to the *Romish* religion, or to move them or any
“ of them to promise any obedience to any pretended au-
“ thority of the see of *Rome*, or of any other prince, state or po-
“ tentate, to be had or used within her dominions, or shall do any
“ overt-act to that intent or purpose, they shall be adjudged traitors ;
“ and the persons who shall be willingly absolved, or withdrawn
“ as aforesaid, or willingly reconciled, or shall promise obedience
“ to any such pretended authority, prince, state, or potentate as
“ aforesaid, they, their procurers and counsellors thereunto shall
“ suffer as in case of high treason.

“ Aiders and maintainers of the persons offending, knowing the
“ same, or who shall conceal such offense, and not within twenty
“ days disclose the same to some justice of peace, &c. shall forfeit
“ as in misprision of treason : justices of peace to have cognizance
“ of offenses, except treason and misprision of treason.

Nota the words (*for that intent*) run through the whole clause
of disswading from the religion of the church of *England* : *vide posita* statute 3 *Jac. cap. 4.*

The religion established within the meaning of this act seems
to be that book of articles mentioned and enjoined to be assented to
by all men taking orders by the statute of 13 *Eliz. cap. 12.*

23 *Eliz. cap. 2.* “ Advised and malicious speakers of seditious or
“ scandalous tale of the queen of their own imagination shall for the
“ first offense be set upon the pillory, lose both ears (or at the
“ offender’s election pay two hundred pounds) and suffer six months
“ imprisonment.

“ If any shall advisedly and with malicious intent report false,
“ seditious and slanderous news or tales of the queen of the re-
“ porting of another, than to be set on the pillory and lose one of
“ his ears (unless he pay two hundred marks) and suffer imprison-
“ ment three months : second offense after a first conviction shall be
“ felony without clergy.

“ If any shall within or without the queen’s dominions advisedly
“ and with a malicious intent against the queen devise and write,
[334] “ print, or set forth any book or writing, containing any
“ false, seditious or scandalous matter against the queen,
“ or to the encouraging, stirring, or moving any insurrection or
“ rebellion within the realm or dominions thereof ; or if any per-
“ son

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“ son within or without the realm shall advisedly, and with a
“ malicious intent against the queen procure or cause any such
“ book or writing to be written, printed, published or set forth,
“ (the said offense not being punishable by the statute of 25 E. 3.
“ concerning treason, or by any other statute, whereby an offense
“ is made or declared treason) every such offense shall be judged
“ felony without the benefit of clergy.

“ If any person either within or without the queen's dominions
“ shall by erecting a figure, casting nativities, prophesying, witch-
“ craft, conjurations, or other like unlawful means seek to know,
“ and shall set forth by express words, deeds, or writings, how
“ long the queen shall live, or who shall reign after her, or ma-
“ liciously utter any direct prophecies to that purpose; or shall
“ maliciously by words, writings or printing wish, will or desire
“ the death or deprivation of the queen, or any thing directly to
“ the same effect, the offender, their aiders, procurers and abettors
“ in or to the said offenses shall suffer as felons without the benefit
“ of clergy.

Offenses made felony by this act committed by persons out of the
realm shall be inquired, heard and determined in the county where
the king's bench sits, and limits the proof and manner of proceeding;
no corruption of blood, loss of dower, or forfeiture of lands longer
than during life.

Two witnesses required to prove words.

The act of 1 & 2 P. & M. and 1 Eliz. concerning scandalous
words are repealed: this act to continue only during the queen's
life.

These things are observable upon this act,

1. There may be some words or writings, that consequentially may
be construed to stir up insurrection, and yet are not within the statute
of 25 E. 3. for this statute supposes some may be within it, and
some may not.

2. That casting the king's nativity, how long he shall live, who
shall succeed him, or using prophecies to that effect, tho done [335]
maliciously, or wishing the king's death, was not treason within the act of 25 E. 3. or of any statute then in force, tho
they are great offenses; for had they been treason, this statute
would never have made it only felony, and tha only during the
queen's life.

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27 Eliz. cap. 1. " If any open invasion or rebellion shall be made
" within her majesty's dominions, or any act attempted tending to
" the hurt of her majesty's person by or for any person, that shall or
" may pretend title to the crown after the queen's death, or if any
" thing shall be compassed or imagined tending to the hurt of the
" queen's person by any person or with the privity of any person,
" that shall or may pretend title to the crown of this realm, then by
" her majesty's commission twenty-four privy counsellors and lords of
" parliament at least, with the assistance of such judges of the courts
" of *Westminster*, as the queen shall appoint, or the greater number
" of them, shall by virtue of this act have authority to examine all
" and every the offenses aforesaid, and all circumstances thereof, and
" thereupon to give sentence or judgment, as upon good proof the
" matter shall appear unto them; and after such sentence or judgment
" given, and declaration thereof by her majesty's proclamation under
" the great seal, all such persons, against whom such judgment or
" sentence shall be given or published, shall be excluded and disabled
" to claim or pretend to have any title to the crown of *England*.

" And all the queen's subjects may by virtue of this act and her
" majesty's direction by all possible means pursue to death every such
" wicked person, by whom such invasion or wicked act shall be at-
" tempted, or other thing compassed or imagined against her majesty's
" person, and all their aiders, comforters and abettors.

Provision is made in case the queen should be killed by such at-
tempt for prosecution of the offender, and exclusion of the person
offending from succession to the crown, &c.

Nota, this extraordinary commission was issued thus by authority
of parliament in relation to the queen of *Scots*, who was by virtue
thereof sentenced to death and executed.

[336] This was but a temporary act, but the precedent of this
commission to sentence and give judgment without a trial by
jury, was the first of that nature that I remember to have been issued
by parliament.

27 Eliz. cap. 2. " It shall not be lawful for any jesuit, seminary
" priest, or other such priest, deacon, or religious or ecclesiastical
" person whatsoever being born within this realm or other her high-
" ness's dominions, and made, ordained or professed, or to be made,
" ordained or professed by any authority or jurisdiction derived, chal-
" lenged or pretended from the see of *Rome* by or of what name, title
" or

“ or degree soever the same shall be called or known, to come into,
 “ be or remain in any part of this realm, or any of her highnes’s.
 “ dominions after the end of forty days, other than in such special
 “ cases, and upon such special occasions only, and for such time
 “ only, as is expressed in this act ; and if he do, then every such of-
 “ fense shall be high treason, and every such person as shall wittingly
 “ and willingly receive, relieve, comfort, aid, or maintain any such
 “ priest, &c. being at liberty and out of hold, knowing him to be
 “ such, shall be guilty of felony without clergy.

“ If any of the queen’s subjects (not being a jesuit, seminary priest,
 “ deacon, or religious or ecclesiastical person) be brought up in any
 “ college or seminary beyond sea, shall not return within six months
 “ after proclamation in *London*, and within two days after his return
 “ before the bishop of the diocese, or two justices of the peace sub-
 “ mit to her majesty’s laws, and take the oath of supremacy, then
 “ such person, who shall otherwise return into this realm or other
 “ the queen’s dominions, shall be adjudged a traitor.

“ Sending relief to any jesuit, seminary priest, or college of priests
 “ or jesuits beyond the seas, or to one not returning out of such col-
 “ lege into *England*, shall incur a *præmunire*.

“ Every offense against this act shall be tried in the king’s bench in
 “ the county where it sits, or in any other county, where the offense
 “ was committed, or offender apprehended.

“ If a jesuit, seminary priest, &c. within three days after his arri-
 “ val in the queen’s dominions submit to some archbishop, [337]
 “ bishop, or justice of peace, and take the oath of supre-
 “ macy, and by writing under his hand profess to continue obedient
 “ to the laws, then he shall not be subject to any penalty.

“ Trial of peers in the case of treason, felony, or *præmunire* to be
 “ by peers.

“ Any person knowing such priest to be within the realm contrary
 “ to this act, and not discovering it to a justice of peace, &c. within
 “ twelve days, shall be fined and imprisoned during the queen’s plea-
 “ sure, and a justice of peace to whom such discovery is made, not
 “ informing one of the privy council, &c. shall forfeit two hundred
 “ marks.

29 Eliz. cap. 2. “ No attainer of treason that now is, where the
 “ party is executed, shall be reversed for error,

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25 Eliz. cap. 2. "A suspected jesuit or priest refusing to answer directly upon his examination shall be imprisoned for his contempt, until he shall make direct answer.

And these are all the acts concerning treason in the queen's time, that I remember, except particular acts of attainder, whereof some are temporal, some perpetual.

In the time of king James, besides the particular acts touching the treason of the conspirators of the powder-plot, and the treasons of the lords Cabham and Gray, there are some general clauses touching treason in the statutes of 3 Jac. cap. 4. (g), and 5, and among them this special clause which enlarged the statute of 23 Eliz. cap. 1. viz.

" If any person shall upon or beyond the seas, or in any other place within the dominions of the king, his heirs or successors, put in practice to absolve, perswade or withdraw any of the king's subjects from their natural obedience to his majesty, his heirs or successors, or to reconcile them to the pope or see of Rome, or to move any of them to promise obedience to any pretended authority of the see of Rome, or any other prince, state or potentate, then such persons, their procurers, counsellors and aiders, and maintainers [338] " knowing the same shall be adjudged traitors, and likewise the persons willingly absolved or withdrawn, &c. their aiders, abettors, maintainers, &c. knowing the same shall be adjudged traitors, to be indicted and proceeded against in any county where taken, as if the offense were committed in that county.

This act is much more strictly pen'd against such offenders, than the statute of 23 Eliz. cap. 1. 1. It extends larger as to the place of such offense. 2. The words (*to that intent*) which bound up the statute of 23 Eliz. more strictly, are here omitted. 3. The disjunctive clauses in this statute have a greater latitude. 4. It extends to maintainers of the offenders knowing the same.

Neither do I find any special new act generally touching treason from this time till the 13th year of king Charles II.

13 Car. 2. cap. 1.

1. " If any person after 24 June 1661. during the king's life shall within the realm, or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim, wounding, imprisonment, or restraint of

(g) The oath of allegiance appointed hereby, and this statute so far as relates to the said oath, are abrogated by 1 W. & M. cap. 8.

" the

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" the person of the king; or to deprive or depose him from the style,
" honour, or kingly name of the imperial crown of this realm, or of
" any other his majesty's dominions or countries, or to levy war
" against his majesty within the realm, or without, or to move or stir
" up any foreigner to invade this realm, or any other his majesty's
" dominions being under his majesty's obeysance, and such compaf-
" fings, imaginations, inventions, devices, or intentions, or any of
" them shall express, utter, or declare by any printing, writing,
" preaching, or malicious and advised speaking, being legally con-
" victed thereof upon the oath of two lawful and credible witnesses
" upon trial, or otherwise convicted or attainted by due course of
" law, then every such person shall be deemed a traitor, and suffer
" and forfeit as in cases of high treason.

" 2. If any after 24 June 1661. during his majesty's life shall ma-
" liciously and advisedly publish or affirm, that the king is an heretic
" or papist, or endeavours to introduce popery, or maliciously and
" advisedly by writing or speaking shall express, publish,
" utter or declare any words or things to incite the people to [339]
" hatred or dislike of his majesty or the established government, shall
" be disabled to enjoy any office or promotion ecclesiastical, civil, or
" military, or other employment, than that of peerage, and suffer
" such farther punishment as may be by law inflicted.

3. " Any that shall maliciously and advisedly affirm the parliament
" of 3 Nov. 1640. is yet in being, or that there lies obligation upon
" any by any oath, engagement or covenant to endeavour a change
" of government in church or state, or that both or either house of
" parliament have a legislative power without the king, shall incur the
" penalty of a *præmunire* 16 R. 2.

4. " No person to be prosecuted for any of the said offenses, ex-
" cept treason, but by order of the king under his sign manual, or of
" the council, nor unless prosecuted within six months after the of-
" fense, and indicted within three months after prosecution.

5. " None to be indicted, arraigned, convicted, or condemned of
" any of the said offenses, unless the offender be accused by two law-
" ful and credible witnesses upon oath, which witnesses upon his ar-
" raignment shall be brought in person before the offender face to face
" and maintain upon oath what they have to say against him, unless
" the party arraigned shall willingly without violence confess the same

6. " This shall not deprive members of parliament of their free
" debates. U 4 " Trial

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“ Trial by peers: peer convicted disabled to sit in parliament till his
“ majesty pardon him (*h*). ”

(*b*) The acts relating to treason and offenses of that nature, which have passed since our author wrote, may be reduced to these three heads; 1. Such as more immediately relate to the king and his government. 2. Such as relate to the coin. 3. Such as relate to the manner of trials and other proceedings.

1. As to the first, such as relate to the king and his government.

By 9 W. 3. cap. 1. “ If any of the king’s subjects, who have voluntarily gone into France, or any the French king’s dominions in Europe before 11 Dec. 1668, without licence from the king or queen, or who have at any time during the late war with France born arms in the service of the French king, or who have since the 13th February 1688, been in arms under the command or in the service of the late king James in Europe, shall return into this kingdom of England, or any other the king’s dominions without licence from the king under the privy seal, such person shall be adjudged guilty of high treason. Where the offense shall be committed out of the realm, it may be tried in any county.”

[340] Upon this act these things are observable.

1. That this act doth enact some treasons, which certainly were so by 25 E. 3. as bearing arms in the service of the French king during the war with France, which is plainly an adhering to the king’s enemies; and tho’ 25 E. 3. says adhering to the king’s enemies in the realm, yet it immediately adds giving them aid and comfort in his realm or elsewhere, Co. P. C p. 11. Vaughan’s case, 2 Salk. 635. indeed all the treasons by this act are compounded of this old treason, altho’ they be new in form for the sake of facilitating the proof in some instances, Hil. 2 Ann. Boucher’s case, State Tr. Vol. V. p. 511.

2. That a pardon under the great seal (after having been in the service of the French king and before returning) of all treasons, &c. will not amount to a licence to return, because it is the returning, which is the treason punishable by this act. 3 Ann. Lindsay’s case, State Tr. Vol. V. p. 518.

3. That a Scotchman going out of Scotland into France (especially if formerly resident in England) after the time mention’d in the act, and returning into England is within the words and meaning of the act, even tho’ he had a licence to return into Scotland. Ibid.

4. That a person offending against this act by returning into England may be indicted in any county where he is taken,

altho’ it be not the first English county into which he came. *Ibid.*

5. That this act is perpetual and extends to the king’s successors, altho’ the act speak only of the king generally and not of his successors, according to the resolution 12 Co. Rcp. 109. *vide supra* p. 100.

By 13 & 14 W. 3. cap. 3. “ The pretended prince of Wales is attainted of high treason, and it is made high treason for any of the king’s subjects by letters, messages or otherwise to hold correspondence with him or any person employed by him, or to remit any money for his use knowing the same. And by the 17 Geo. 2. this is extended to the pretender’s son. Provides that offenses against this act committed out of the realm may be tried in any county.

By 1 Ann. cap. 17. “ It is made high treason to attempt by overtact or deed to deprive or hinder any person next in succession to the crown (according to the limitation of the crown by 1 W. & M. s. 1. 2. cap. 2. and 12 W. 3. cap. 2.) from succeeding after the decease of the queen; but this succession has now happily taken place, and thereby put an end to this statute.

By 3 & 4 Ann. cap. 14. “ If any subject, who has voluntarily gone into France since 4 May 1701, or into any the French king’s dominions in Europe without licence from the queen, or has since the said 4 May born arms in the service of the French king, shall return into England without licence from the queen under her privy seal, he shall be adjudged guilty of high treason.

By 4 Ann. cap. 8. “ It is made high treason for any one maliciously to affirm by writing or printing, that the pretended prince of Wales, or any other person hath any right to the crown of these realms, other than according to 1 W. & M. and 12 W. 3. or that the kings of England are not able by authority of parliament to make laws to bind the descent, limitation, inheritance and government of the crown. To declare the same things by preaching, teaching or advised speaking is made a *prævaricatio*. This act (which is in the main transcribed from 13 Eliz. cap. 1.) was re-enacted upon occasion of the union 6 Ann. cap. 7. Upon this statute Matthews the printer was convicted and executed for printing a pamphlet intituled. *Vox Populi Vox Dei* Octob. 30. 1719. at the Old Bailey.

By 7 Ann. cap. 4. “ It is high treason for any officer of the army or soldier by land or sea to hold correspondence with any

" any rebel or enemy to her majesty, or to
" treat with such rebel or enemy without
" her majesty's licence,

By 7 Ann. cap. 21. " Whatever is high
" treason or misprision of treason in Eng-
" land, (and none else) shall be high
" treason or misprision of treason in Scot-
" land.

II. Such as relate to the coin.
By 8 & 9 W. cap. 25. " Whoever shall
knowingly make or mend, or assist in
making or mending, or shall buy or sell,
or have in his possession any instruments
proper for the coinage of money, or
convey such instruments out of the
king's mint, or shall mark on the edges
any coin current or diminished coin of
the kingdom, or any counterfeit coin

[341] " resembling the coin of the
kingdom with letters or
other marks like to those on the edges,
of money coined in the king's mint, or
shall colour, gild or case over any coin
resembling the current coin of the king-
dom, or any round blanks of base me-
tal, &c. shall be guilty of high treason.
No attainer by this act shall work cor-
ruption of blood or loss of dower,
or prosecution be for any offense against
the same, unless commenced within three
months after the offense committed;"
this act was but temporary.

But by 7 Ann. cap. 25. it is made perpe-
tual, and the time of prosecution enlarged
from three months to six months after the
offense committed.

Other statutes relating to the coin enacted
since the edition of this book in 1736, are
the 15. 16. Geo. 2. ch. 28. concerning gilding,
washing colouring, &c. coin; and
rewards for convicting offenders; and
pardon to accomplices informing—the 11
Geo. 3. ch. 40. concerning counterfeiting
halfpence and farthings.—The 13 Geo. 3.
ch. 71. concerning what is to be done
with false money.—The 14 Geo. 3. ch. 92.
concerning weights for coin.

III. Such as relate to the manner of trials
and other proceedings.

By 7 W. 3. cap. 5. " Every person in-
dicted for high treason, whereby cor-
ruption of blood may be made, shall
have a true copy of the whole indictment,
but not the names of the witnesses, de-
livered to him five days before his trial,
paying for it not exceeding five shil-
lings, and shall be admitted to make
his defence by counsel, and witnesses on
oath, the said counsel not to exceed
two, and to be affigned by the court,
and to have access to the prisoner at all
seasonable times.

" No person shall be indicted, tried,
or attainted but on the oaths of two

" lawful witnesses, which two witnesses
must be to the same treason," altho'
it be not necessary they should both be
to the same overt-act.

" No prosecution to be for any such
treason unless the party be indicted
within three years after the offense com-
mitted, unless it be for a design or
attempt to assassinate the king by poison
or otherwise.

" The prisoner shall have a copy of the
pannel of the jurors two days before
his trial, and shall have like process to
compel the appearance of witnesses for
him, as is usually granted for witnesses
against him.

" No evidence shall be given of any
overt-act not expressly laid in the indict.

" No indictment, process, &c. shall be
quashed for mis-writing mis-spelling,
false or improper Latin, unless excep-
tion be taken in court before any evi-
dence given upon such indictment, nor
shall any such mis-writing, &c. be
cause to stay Judgment after conviction,
but such judgment may nevertheless be
reversed upon writ of error, as before
the making this act.

" In the trial of a peer or peers all
peers intitled to vote in parliament
shall be summoned twenty days before
the trial, and every one so summoned
and appearing shall vote at such trial
first taking the oath to the government,
&c.

" Provided that this act shall not ex-
tend to impeachments or other proceed-
ings in parliament, nor to indictments
of high treason, nor any proceedings
thereupon for counterfeiting his ma-
jesty's coin, great seal, privy seal, liga-
manual, or privy signet.

By 1 Ann. cap. 9. " In any trial for trea-
son or felony the witness for the pris-
oner shall be upon oath.

By 7 Ann. cap. 21. " After the decease
of the present pretender no attainer of
treason shall work a disinherition of the
heir, nor affect any other right, save
that of the offender for his natural life
only, and every person indicted for
high treason or misprision of treason
shall have a list of the witnesses to be
produced against him on his trial, and
of the jury, mentioning the places of
their abode, &c. given to him together
with the copy of the indictment ten days
before his trial, in the presence of two
credible witnesses.

C H A P. XXVI.

Concerning the judgments in high treason and the particulars relating thereto, and to attainders.

THIS Chapter divides itself into these particulars: 1. Touching the person against whom the judgment is to be given. 2. By whom it is to be given. 3. What the form of the judgment is. 4. What the consequents thereof are.

I. Touching the person, against whom a judgment in treason is to be given.

In antient time, if a man had been slain in open war against the king either in rebellion, or adhering to the king's enemies, the king did *de facto* take a forfeiture, sometimes by presentment in Eyre, sometimes by presentment in the king's bench, and sometimes by inquisition by the eschetor: for this see the whole pleading in the chancery, *Clauſ. 29 E. 3. M. 2. & 4.* for the coheirs of *Rabert de Ross* for the manor of *Werk*.

But in all other cases, whether of felony or treason, if the party had died before attainder, tho he were killed in the pursuit, *Clauſ. 26 E. 3. m. 29. pro Ricardo filio Adæ Peſchall;* and *H. 16 E. 1. Rot. 27. coram rege. Suffex, pro Stephano Northup* (a) *M. 20 & 21 E. 1. Rot. 4. in dorf. coram rege pro Johanne de Bekingham* (b), or

tho

(a) That case was thus: *Richard de Northup' de Eſſden* killed *Endo de Shels-
bougre* in the reign of *Henry III.* for which
murder he was indicted and outlawed upon
an exigent awarded against him by the ju-
stices itinerant in *Suffex anno 55 H. 3.* where-
upon his lands were seised, afterwards,
vix. *H. 16. E. 1. Stephen*, brother and
heir of the said *Richard Northup*, implead-
ed the chief lord of the fee *coram rege* for
his said brother's lands, and alledged, quod
*predictus Ricardus obiit ante iter predictorum
iusticiariorum, & quod post mortem suam pos-
suit fuit in exigendis;* upon which point the
parties joined issue, and in the following
Easter-term anno 16 Edw. 1. venerunt iuratores, qui dicant *super sacramentum suum,*
*quod predictus Ricardus Northup' de Eſſ-
dene obiit apud Rotherfield in comitatu pre-
dicto ante predictum iter predictorum iusti-
ciorum;* *Et ideo confidetur ei, quod pre-
dictus Stephanus recuperet signum suum de
predictis terris, &c.*

(b) This was in the county of *Notting-
ham*; *Alan de Bekingham* was appeal'd by
Eve the wife of *Peter de Dynyngton* *de morte*
predicti viri sui before special commis-
sioners of eyre and terminer, upon which the said
Alan was brought before them, and pleaded
*se clericuſeſſe, & non alibi quam in foro ecclieſſi-
ſtico inde poſſe erat debere ratiōndre;* and
thereupon the said justices proceeded *ex
officio de morte predicta inquisitionem capera,*
*& ipsam Alanum per inquisitionem illam cul-
pabilem inde invenerunt, & talem ipsum pri-
fōne regis de Nottingham occidisse mortis
predicta repeat p̄cep̄runt;* *Alan* died in
prison, and after his death the sheriff and
coroners seised all his lands and tenements
into the king's hands, ac *si idem Alanus ab
morte predicta coniunctus fuisset & iudicatus
propter hoc subiiffet;* but upon a *monstratio*
of John, son and heir of the said *Alan*, the
matter came to be heard *coram rege*, and
thereupon in *Trinity-term* following, *anno*
21 Ed. 1. " *Rex ex gratia sua concedit,*
" *quod*

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tho he died after conviction and before judgment, 7 H. 4. 27. a. there ensued neither attainder nor forfeiture of lands.

But the law was practised antiently, and it seems continuing to this day, if a traitor or a felon rescue himself, or will not submit to be arrested and on resistance is slain, upon presentment thereof he shall forfeit his goods and chattles, 3 E. 3. Corone 290, 312. Co. P. C. p. 227. for if a person be arraigned for felony or treason, tho he be acquired, yet if it be found he fled, he forfeits his goods, and this is but in nature of a presentent of *fugam fecit*.

But whether that presentment be traversable, *vide Stamf. P. C. Lib. III. cap. 21. (c)*

Yet the former practice by degrees grew out of use, for in 8 E. 3. 20. a. the judges would not allow an averment, that a party died in rebellion or adhering to the king's enemies, without a record of his conviction, for it is possible he might be there against his will.

But now by the statute of 25 E. 3. *de proditionibus*, which requires an attainder by conviction and attainder *per gonts de leur condition* that attainder after death for adhering to the king's enemies is ousted.

And because it might be said, that an inquest before the eschetor might satisfy those words, the statute of 34 E. 3. cap. 12. hath in express terms for the future ousted such attainders or convictions after the parties death, at least in other cases than of forfeitures of war, and except forfeitures of old times judged after the parties death by presentment in *Eyre*, or in the king's bench, as of felons of themselves; and therefore *Jack Cade*, who was slain in open rebellion, could not be attaint but by act of parliament, and so it is recited in the act of his attainder 29 H. 6. cap. 1.

Yet after the statute of 34 E. 3. the earl of *Salisbury* and others, who conspired against *Henry IV.* and levied war against him, and in their flight were taken, had their heads stricken off by those that apprehended them, without any judgment given against them, and after their death judgment of treason was given against them by the king and lords in parliament, *Rot. Par. 2 H. 4 n. 30.* upon which the heir of the earl of *Salisbury* brought a petition of error, *Rot. Par. 2 H. 5. part. 1. m. 13.* and assigned for error among other

" quod praedictus *Jobannes* filius *Alani de Batingham* habeat seisinam de tenementis " praeceptum est vicecomiti, quod habere " in manu domini regis existentibus, salvo " faciat praedicto *Jobanni* seisinam de pra- " jure suo & heredium suorum & aliorum, " dictis tenementis in forma praedita cum " cum inde loqui voluerint, &c. Et ideo " pertinentiis, &c.
(e) fol. 183. b.

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errors, that his ancestor was dead at the time of the judgment given in parliament, but yet the judgment was affirmed; yet afterwards *Rot. Par. 9 H. 5. n. 19.* to avoid all questions he was restored by act of parliament.

Again, no man ought to be attainted of treason without being called to make his defense and put to answer, which is called *ar-
renatio* or *ad rationem positus*.

Claus. 1 E. 3. part. 1. m. 21. dorf. Thomas earl of Lancaster was condemned to death, as a traitor by Edward II. at Pontefract, Henry his brother brought a petition of error in the parliament of 1 E. 3. upon that judgment, the record was removed in these words.

“ Placita coronæ coram domino Edwardo rege filio domini regis
 “ Edwardi tenta in præsentia ipsius domini regis apud Pontem-fractum
 “ die lunæ proximæ ante festum annunciationis beatæ Mariae virgi-
 “ nis anno regni sui quintodecimo.

“ Cum Thomas comes Lancastriæ captus pro proditionibus, homi-
 “ cidiis, incendiis, depredationibus, & aliis diversis felonii ductus esset
 “ coram ipso domino rege, præsentibus Edmundo comite Kani’, Jo-
 “ hanne comite Richemund’ Adomaro de Valenciam comite Pembrach’,

[345] “ Johanne de Warennâ com’ Surr’, Edmundo com’ Arundoll’,
 “ David com’ Athol, Roberto comite de Anegas, baronibus
 “ & aliis magnatibus regni, dominus rex recordatur, quod idem
 “ Thomas homo ligeus ipsius domini regis venit apud Burton super
 “ Trentam simul cum Humfr’o de Bohun nuper com’ Heref’, prodi-
 “ tote regis & regni invento cum vexillis explicatis apud Pantem
 “ Burgi in bello contra dominum regem, & ibidem interfecto, & Re-
 “ gero Damory proditore adjudicato, & quibusdam aliis proditoribus
 “ & inimicis regis & regni cum vexillis explicatis, & ut de guerrâ
 “ hostiliter resistebat & impedivit ipsum dominum regem & homines
 “ & familiares suos per tres dies continuos, quo minus pontem dictâ
 “ ville de Burton transire potuerunt, &c.—Et unde dominus rex, ha-
 “ bito respectu ad tanta dicti Thomæ comitis facinora, & iniquitates
 “ ejus, & ejus maximam ingratitudinem, nullam habuit causam ad
 “ aliquam gratiam eidem Thomæ comiti de poenis prædictis super ip-
 “ sum adjudicatis pardonand’ in præmissis faciend’, quia tamen idem
 “ Thomas comes de parentelâ excellenti & nobilissimâ procreatus est,
 “ dominus rex ob reverentiam dictâ parentelâ remittit de gratiâ suâ
 “ speciali predicto Thomæ comit execusionem duarum poenarum ad
 “ judicatarum, sicut predictum est, scilicet quod idem Thomas comes

“ non

" non trahatur, neque suspendatur, sed quod executio tantummodo
" fiat super ipsum *Thomam* comitem, quod decapitetur.

" Thereupon the record being read in præsentia domini regis, pro-
" cerūm & magnatūm regni & aliorum in hoc parlimento, he assign-
" ed these errors: 1. Quòd erratum est in hoc, quòd cum quicun-
" que homo ligatus domini regis pro seditionibus, homicidiis, robberyis,
" incendiis & aliis felonii tempore pacis captus, &c in quācunque
" curiâ regis ductus fuerit, de hujusmodi seditionibus & aliis felonii
" sibi impositis, per legem & consuetudinem regni arrenari debet, &
" ad responcionem poni, & inde per legem &c. convinci, antequam
" fuerit morti adjudicatus; licet prædictus *Thomas*. comes, homo
" ligatus prædicti domini regis patris, &c. tempore pacis captus, &
" coram ipso rege ductus fuit, dictus dominus rex pater, &c. record-
" abatur ipsum *Thomam* esse culpabilem de seditionibus & felonii in
" prædictis recordo & processu contentis, absque hoc, quod [346]
" ipsum inde arrenavit seu ad responcionem posuit, prout
" moris est secundum legem, &c. & sic absque arrenamento & ref-
" ponione idem *Thomas* erronicè, & contra legem terræ tempore pacis
" morti exittit adjudicatus, unde cum notorium fit & manifestum,
" quod totum tempus, quo impositum fuit eidem comiti prædicta mala
" & facinora in prædictis recordo & processu contenta fecisse, &
" etiam tempus, quo captus fuit, & quo dictus dominus rex pater
" recordabatur ipsum esse culpabilem, &c. & quo morti exittit adju-
" dicatus, fuit tempus pacis, maximè cum per totum tempus prædic-
" tum cancellaria & aliæ placeæ curiæ domini regis apertæ fuerunt, &
" in quibus lex cuicunque fiebat, prout fieri consuevit, nec idem do-
" minus rex unquam in tempore illo cum vexillis explicatis equitabat,
" prædictus dominus rex pater, &c. in hujusmodi tempore pacis con-
" tra ipsum comitem sic recordari non debuit, nec ipsum sine arrena-
" mento & responcione morti adjudicasse. Dicit etiam, 2. Quod er-
" ratum est in hoc, quod cum prædictus *Thomas* comes fuisset unus
" parium & magnatūm regni, & in Magnâ Cartâ de libertatibus
" Angliæ contineatur, quod nullus liber homo capiatur, imprisonetur,
" aut difficietur de libero tenemento suo, vel libertatibus, seu liberis con-
" suetudinibus suis, aut utlagetur, aut exulet, nec aliquo modo destru-
" atur, nec dominus rex super eum ibit, nec super eum mittet, nisi per
" legale judicium parium suorum, vel per legem terræ, prædictus *Thomas*
" comes per recordum regis, ut prædictum est, tempore pacis érro-
" nè morti fuit adjudicatus absque arrenamento seu responcione, seu
" legali

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" legali judicio parvum suorum, contra legem, &c. & contra tenorem
" Magnæ Cartæ prædictæ: and therefore, as brother and heir of
" Thomas, prays that the judgment be annulled, and he restored to
" his inheritance, & quia inspectis & plenius intellectis recordo &
" processu prædictis, &c. ob errores prædictos & alios in eisdem re-
" cordo & processu compertos consideratum est per ipsum dominum
" regem, proceres, magnates & totam communitatem regni in eodem
" parlamendo, quod prædictum judicium contra prædictum Thomam
[347] " comitem redditum tanquam erroneum, revocetur & adnul-
" letur, & quod prædictus Henricus, ut frater & heres ejus-
" dem Thomas comitis, ad hereditatem suam petendam & habend' de-
" bito processu inde faciend', prout moris est, admittatur, & habeat
" brevia cancellariae, & quod justic', in quorum placeis dicta recordum
" & processus irrrotulantur, eadem recordum & processus irritari fa-
" ciunt & adnullari, &c. P. 15 E. 2. B. R. Rot. 69. Et Pasch. 39
E. 3. Rot. 49. coram Rege.

This notable record, even before the Statute of 25 E. 3. gives us an account of these things: 1. That in time of peace no man ought to be adjudged to death for treason, or any other offense without being arraigned and put to answer. 2. That regularly, when the king's courts are open, it is a time of peace in judgment of law. 3. That no man ought to be sentenced to death by the record of the king without his legal trial *per pares*. 4. That in this particular case the commons, as well as the king and lords, gave judgment of the reversal.

John Matravers was attainted of treason in the parliament of 4 E. 3. n. 3. for the death of the earl of Kent, as hath been before shewn, cap. 11. p. 82. in his absence, Rot. Par. 21 E. 3. n. 65. dorſ. the same John Matravers sued in parliament to reverse that judgment, and affigned for error, q̄ il est adjuge a mort in un parlement tenuſ a Westminſter en l' absence de lui, nient indite, nient arrayne, ne appell a respons, contre le ley de realm & les usages approves; he did not prevail in that parliament but Rot. Par. 25 E. 3. n. 54 & 55. he had a restitution by the king confirmed in parliament.

Roger Mortimer earl of March was condemned for treason for the death of king Edward II. Rot. Par. 4 E. 3. n. 1. his cousin and heir Roger Mortimer, Rot. Par. 28 E. 3. n. 9 & 10. brought a petition of error upon that judgment, whereupon the record of his attainder

was

was removed into parliament, and there entered of record, and errors assigned; the judgment of reversal is thereupon given in this form.

" Les queux record & judgment lues & examine in plein parlement
 " le dit Roger cosin & heyre de dit counte dit & alledge, qe les record
 " & judgment susdit sont erroynes & defective in tous points,
 " & nosment en tant come le dit counte estoit myse a mort & [348]
 " disherite sans nul accusement & sans estre mesme en judgment, ou
 " en respons, dont il prie, qe les record & judgment avant dits soient
 " revers & adnulls, A sur ceo ove bone deliberation ed avisé ed grand
 " leisure per nostre dit seigneur le roy, prelates, prince, & duca,
 " countes, & barons avant dit, il peint clerement, qe mesmes les judg-
 " ment & records sont erroynes & defectives en tous points, par quoi
 " nostre dit seigneur le roy & les dits prelates, prince, ducs, countes,
 " & barons par accord des chivalers des countes & des commonas repel-
 " lent, & anyentissent, & pur erroyn & irrit adjuggent les records &
 " judgment susdits," and restore *Roger* the petitioner to the title of
 earl of *March*, and to the lands, &c. of his grandfather.

But if the party accused declined his appearance, it is true then, that the law of the land is, that he should be proceeded against to an outlawry, and may thereby be attainted by process of outlawry without answer, for he declines it by his own default.

And sometimes there was a more compendious way, namely, the issuing of a proclamation-writ to appear in a month, two, or three in the court of king's-bench, or that in default thereof the party should be attainted of treason or such other offense, wherewith he was charged; and this was frequently done by act of parliament in particular cases, not unlike the process enacted in case of an assault upon a member of parliament by the statute of 5 H. 4. cap. 6. and 11 H. 6. cap. 11.

Sometimes the lords house did make such a direction, as in the case of *Talbot*, Rot. Par. 17 R. 2. mention'd before, p. 265. but it could not be effectual to attaint the party upon his default of appearance upon the return of proclamation without act of parliament, or process of outlawry.

Again, as a man could not be attainted of treason without arraignment, if present, or process of outlawry, if absent, so neither could he be arraigned without an accusation; and this accusation was of three kinds: 1. If he were taken with the *mainouer*. 2. By way of appeal. 3. By way of indictment.

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1. In antient time, sometimes as well in case of treason, as in case of felony a man, that was taken *cum manu opere*, was thereupon arraigned, an instance we have thereof, *T. 10 E. 2. Rot. 132. Bucks cited before p. 186.*

But this is wholly disused and ousted by the statutes of *5 E. 3. cap. 9.* and *25 E. 3. cap. 4.* by which statutes none shall be put to answer without indictment or presentment of good and lawful men of the neighbourhood.

2. By appeal, and this was usual at common law, as appears by *Britton, cap. 22.* but this kind of proceeding by appeal in the king's ordinary courts in cases of treason hath been long disused, and it seems is wholly taken away by the statutes of *5* and *25 E. 3.* above-mentioned.

But yet notwithstanding that course of appeal continued still in parliament, as appears by several instances, especially in the great appeal of treason by the lords appellants in *11* and *21 R. 2. (d)*, but by the statute of *1 H. 4. cap. 14.* all appeals in parliament are wholly taken away, and accordingly upon reference to the judges upon the impeachment made in the lord's house by the earl of *Bristol* against the earl of *Clarendon* in the present parliament, it was resolved and reported by all the judges. *(e)*

But yet that statute hath not taken away impeachments by the house of commons in cases of treason or other misdemeanors, and therefore tho' since *1 H. 4. cap. 14.* all appeals of treason by particular persons are taken away, and have been wholly disused, yet impeachments by the commons have been ever since very frequently used, because they are rather in the nature of grand indictments, than appeals.

3. By way of indictment, this is the regular and legal way of proceeding in case of treason.

And thus far for the persons against whom judgment of treason may be given, and the manner of deducing them unto judgment.

II. As touching the persons, by whom judgment of treason may be given; this concerns more especially the jurisdiction of courts: a word touching it.

[350] 1. Justices of peace cannot regularly arraign, try or give judgment in case of treason, unless in such cases, as are by special act of parliament committed to their cognizance, as *26 H. 9.*

(d) State Tr. Vol. I. p. 4.

(e) State Tr. Vol. II. p. 552.

cap.

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cap. 6. 5 Eliz. cap. 1. 13 Eliz. cap. 2. 23 Eliz. cap. 1. and some others, because their commission extends not to it, yet they may take examinations touching treason in order to the discovery thereof and preservation of the peace.

2. Justices of *oyer* and *terminer* may give judgment in case of high treason, for it is expressly within their commission.

3. Justices of goal-delivery may give judgment in case of treason on any person in prison before them, and that is proved by the statute of 1 E. 6. cap. 7. and by the constant practice.

4. Justices of *Nisi prius* may give judgment in case of treason by the statute of 14 H. 6. cap. 1. but *quære*, whether it be barely by force of that commission, or whether it must be by virtue of some other commission.

5. Justices of the king's bench in the court of king's bench may give judgment in case of treason, for it is the highest court of ordinary justice, especially in criminals.

6. If a peer be indicted and plead not guilty to his indictment, and is tried by his peers and found guilty, the lord steward commissionated by the king for that office gives the judgment, and orders execution.

7. If a peer be tried in parliament by the lords, they usually elect a person to be lord steward to gather up their votes and pronounce the judgment, but for the most part that steward so elected, tho in parliament, is commissionated by the king under his great seal; but of this more hereafter.

III. I come to the form of the judgment.

The judgments in case of treason are of two kinds, *viz.* the solemn and severe judgment, and the less.

The solemn or severe judgment against a man convict of high treason is set down, *Co. P. C. p. 210. Stamp. Lib. III. cap. 19. (f)*, 1 H. 7. 24. *a Stafford's case & alibi*, "Et super hoc visis & per curiam "hic intellectis omnibus & singulis præmissis confidératum est, "1. Quod prædictus R. usque furcas T. trahatur. 2. Ibi- [351] "dem suspenderatur per collum, & vivus ad terram prosternatur. 3. Interiora sua extra ventrem suum capiantur. 4. Ipsoque "vivente (g) comburantur, & 5. Caput suum amputetur. 6. Quod- "que corpus suum in quatuor partes dividatur. 7. Et quod caput & "quarteria illa ponantur, ubi dominus rex ea assignare voluerit.

(f) p. 182. a.

them in the case of *Walket*, 35 Cor. 2.

(g) These words are so material, that
the judgment was reversed for want of

Show. Co. Parl. 127. 1 Salk. 632.

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The king may and often doth discharge or pardon all the punishment, except beheading, and in as much as that is part of this judgment, it may be executed by the king's special command, tho the rest be omitted.

In the case of a woman her judgment is to be drawn and burnt, as well in high treason, as petit treason, and she is neither hanged nor beheaded.

The less solemn judgment is only *to be drawn and hanged*, and this is regularly the judgment in case of counterfeiting the coin of this kingdom, for that was the judgment in that case at common law, which was not altered by the statute of 25 E. 3. *viz.* "Super quo
"visis, &c. consideratum est, quod *B.* usque furcas de *T.* trahatur,
" & ibidem suspendatur per collum, quousque mortuus fuerit.

But the judgment in that case also for a woman is to be drawn and burnt, 25 E. 3. 85. b.

And it seems the same judgment was also for importing counterfeit coin, and yet that was not treason at common law.

And the same judgment was for counterfeiting the great or privy seal at common law, as may be easily gathered out of *Braeton*, Lib. III. de Corona, cap. 3. but expressly by *Fleta*, Lib. I. cap. 22. *Crimen falsi dicitur, cum quis accusatus fuerit quod sigillum regis, vel appellatus, quod sigillum domini sui de cuius familiâ fuerit, falsaverit, & brevia inde consignaverit, vel cartam aliquam vel literam ad exhortationem domini vel alterius damnum sic sigillaverit, & quibus casibus, si quis inde convictus fuerit, detraictari meruit & suspendi.*

And accordingly the like judgment hath been given, as in case of [352] petit treason, for counterfeiting the great seal after the statute of 25 E. 3. as appears by 2 H. 4. 25. and the record is accordingly (*h.*) ; and tho it is true my lord *Coke* saith, it is a mistake *Co. P. C. p. 15.* yet I rather think it was a mistake in my lord *Coke*, and that the judgment may be given either way, *viz.* *disträhatur & suspendatur, or disträhatur, suspendatur & decapitetur.*

In the case (*i.*) 16 *Jac.* for counterfeiting the privy signet, which was made treason by the statute of 1 *Mar. cap. 6.* the judgment was the great and solemn judgment of drawing, hanging and quartering.

But suppose the judgment were so in case of counterfeiting the seal, great or privy, yet the question is whether the same judgment must be in those new treasons enacted by 1 & 2 *P. & M. cap. 11.* for

(*b.*) *Vide supra in notis p. 181.*

(*i.*) *Robinson's case, a Rel. Rep. 50.*
counterfeiting

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counterfeiting foreign coin made current by proclamation, and also upon the statutes of 5. Eliz. and 18. Eliz. for clipping and washing, whether must they have the solemn judgment to be hanged and quartered, or only the judgment of petit treason to be drawn and hanged.

And herein by *Stamf. Lib. III. cap. 19. (k)*, and *Co. P. C. p. 17.* the judgment is to be the solemn judgment, and not the judgment to be drawn and hanged, because it is a new treason made by act of parliament, and therefore must have the solemnity of the great judgment in case of high treason.

And surely this is regularly true, and therefore in the case of popish priests, and those other acts of treason newly enacted in the queen's time, the judgment is to be drawn, hanged and quartered; but it seems to me, that the law is otherwise in relation to those new treasons enacted in the time of queen *Mary* and queen *Elizabeth* relating to coin, and that in all those cases the judgment at least may be only to be drawn and hanged; and my reasons are, 1. Because they are *in cognata materia falsificationis monetæ*, and therefore tho they are made treason, yet they are within the verge of the crime of falsification of money, and are to be under the same punishment. 2. It were unreasonable to think, that the parliament should make the counterfeiting of foreign coin to have a greater kind of punishment, than the counterfeiting of the coin of this kingdom, or that clipping *English* or foreign coin should have a greater punishment, than counterfeiting of the coin of this kingdom. [353] 3. As the statute of 25 E. 3. tho it declares as well counterfeiting of money as levying of war to be high treason, yet leaves them under the several degrees of punishments proportionable to their nature, and what they had before, so tho these statutes make those to be new treasons, that were not before, yet in as much as the punishments of treasons were not equal, but that concerning coin was a punishment of a lower alloy, therefore the subject matter of those acts shall govern the degree of their punishment according to that punishment of treason, that relates to coin. 4. And accordingly in the book of T. 6 Eliz. *Dy.* 230. b. it is agreed by the justices, that the punishment *pro tonfurâ monetæ* is only to be drawn and hanged, and upon a strict search into the precedents of *Newgate* from 5 Eliz. downwards, tho some judgments for clipping be the solemn judgments, yet the most and latest are only to be drawn and hanged, and accordingly it was re-

(1) p. 182. b.

X 2

solved

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resolved and done upon great deliberation lately in the king's bench upon the conviction of two *Frenchmen* for clipping of the king's coin (*l*).

But however it seems, that the judgment either of one kind or the other seems not to be erroneous, for hanging and drawing is part of the solemn judgment, and tho either may be perchance warrantable enough, yet certainly the judgment of petit treason in all treasons touching coin is the most warrantable and safe.

IV. I come to consider of the consequents of a judgment in treason.

If the judgment be given by him, that hath authority, and it be erroneous, it was at common law reversible by writ of error; only the statute of 29 *Eliz. cap. 2.* secures all former attaينders, where the party is executed, from reversal by writ of error, but meddles not with other attaينders, neither doth the statute of 33 *H. 8. cap. 20.* take away writs of error upon attaينder of treason, as hath been resolved against the opinion of *Stamf. P. C. Lib. III. cap. 19. (m)*, *Co. P. C. p. 31.*

[354] But it is true, that the statutes of 26 *H. 8. cap. 13.* and 5 & 6 *E. 6. cap. 11.* take away from a person outlawed in treason the advantage of reversal of an outlawry, *because the party outlawed was out of the realm*, but extends not to other offenses.

The consequents of a judgment in treason are, 1. Corruption of blood of the party attaint. 2. Loss of dower to his wife. 3. Forfeiture to the king of all his lands, goods and chattles. 4. Execution, whereof in the next chapter.

See *4. Blackf. Com. ch. xxix. page 375, &c. ch. 23. page 314.*

C H A P. XXVII.

Touching corruption of blood and restitutions thereof, loss of dower, forfeiture of goods, and execution.

THE Consequence of the judgment in high treason, petit treason, or felony, is corruption of blood of the party attaint; unless it be in such special treasons or felonies enacted by parlia-

(*l*) The case of *Bellow and Norman*, *Roym. 234. 1 Inst. 254. (m) p. 182. b.*

ment,

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ment, wherein it is especially provided, that the attainder thereof shall make no corruption of blood, as upon the statutes of 5 and 18 Eliz. in treason for clipping and washing of coin; and upon the statutes of 21 Jac. cap. 26. for acknowledging a recognizance, &c. in another's name, 1 Jac. cap. 11. for bigamy, and many others.

If a man be attaint of piracy before commissioners of *oyer and terminer* grounded upon the statute 28 H. 8. cap. 15. by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28 H. 8. cap. 15. but this works no corruption of blood, because it is an offense, whereof the common law takes no notice, and tho it be enacted, they shall suffer and forfeit as in case of felony, yet it alters not [355] the offense, *Co. P. C. cap. 49. p. 112. vide tamen contra Co. Litt. §. 745. p. 391.*

If a man be attainted before the admiral of treason or felony committed upon the sea, or before the constable and marshal for treason or murder committed beyond the sea, according to the course of the civil law, it works no corruption of blood, for tho these offenses within the cognizance of the common law are felonies or treasons, yet the manner of the trial being according to the course of the civil law, the judgment thereupon, tho capital, corrupts not the blood.

If there be an attainder of treason or felony done upon the sea upon this statute of 28 H. 8. by jury, according to the course of the common law, it seems that the judgment thereupon works a corruption of blood, because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, and therefore the proceeding and judgment thereupon is of the same effect, as an attainder of foreign treason by commission upon the statute of 35 H. 8. cap. 2. or any other attainder by course of the common law, and with this agrees *Co. Litt. §. 745. p. 391.* nay, I think farther, that if the indictment of piracy before such commissioners upon the statute of 28 H. 8. be formed as an indictment of robbery at common law, *viz. vi & armis & felonice,* &c. that he might be thereupon attainted, and the blood corrupted; for whatever any say to the contrary, it is out of question, that piracy upon the statute is robbery, and the offenders have been indicted, convicted, and executed for it in the king's bench, as for a robbery, as I have elsewhere made it evident.

But indeed, if the indictment before these commissioners run only
X 3 according

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according to the style of the civil law, *viz. piraticè deprædavit*, then the attainer thereupon upon the statute of 28 H. 8. though it gives the forfeiture of lands and goods, corrupts not the blood, and so are those two books of the same author, *Co. P. C. cap. 49.* and *Co. Litt. §. 745.* to be reconciled, which without this diversity would be contradictory: *vide H. 13 Car. B. R. Hilliar & Moore.*

[356] By the statute of *Westminster 2. de donis conditionalibus*, if tenant in tail be attaint of felony or treason, there is no corruption of blood wrought as to the issue in tail, because the very blood as well as the land, is entailed, and yet for the advantage of the issue there is a corruption of blood, as if the tenant in tail alien with warranty and assets, and then is attainted, the lien of the warranty is gone, for that lien was not entailed. *Litt. §. 747.* but if the warranty were annexed to the gift in tail, the attainer of the donee doth not destroy the warranty to the issue, for the warranty is entailed.

The statutes of 26 and 33 H. 8. subject estates-tail to forfeiture by attainer of treason, and so the law stands at this day, notwithstanding the statutes of 1 E. 6. and 1 Mar. whereof before.

But yet these acts are not absolutely a repeal of the statute of *donis conditionalibus*, for notwithstanding the forfeiture of the lands entailed by the attainer, yet the blood is not corrupted as to the issue in tail.

And therefore if the son of the donee in tail be attainted of treason in the life of the father, and dies having issue, and then the father dies, the estate shall descend to the grandchild, notwithstanding the father's attainer; but otherwise it would have been in case of a fee-simple.

3 Co. Rep. Dowtie's case, 10. b.

In all cases (but only in cases of entails as before) attainer of treason or felony corrupts the blood upward and downward, so that no person that must make his derivation of descent to, or through the parties attaint, can inherit, as if there be grandfather, father, and son, the father is attainted, and dies in the life of the grandfather, the son cannot inherit the grandfather (*a*).

In cases of collateral descents of lands in fee simple, if there be father and two sons, and the eldest is attainted in the life of the father, and dies without issue in the life of the father, the younger son shall inherit the father, for he needs not mention his elder brother in the

conveying of his title ; but if the elder son attaint survive the father but a day, and die without issue, the second son cannot inherit, but the land shall eschete *pro defectu hæredis*, for the [357] corruption of blood in the elder son surviving the father impedes the descent. 31 E. 1. Barr, 315.

But otherwise it is in case the eldest son had been an *alien nee*, for then notwithstanding such son alien were living, the land will descend from the father to the youngest son born a denizen.

If a man hath two sons and then is attaint of treason or felony, the elder son purchases land and dies without issue, either in the lifetime or after the death of the father, the attainer of the father is no impediment of the descent from the brother to the brother. Sir Philip Hobby's case, Co. Litt. 8.

And the same law is in case the father were first attaint, and then had issue two sons, the elder purchases lands in fee simple and dies without issue, the younger shall inherit, for though both derive their blood from the father, yet the descent from the brother to the brother is immediate, and is not impeached by the attainer of the father, this tho made a doubt, Co. Litt. p. 8. yet was agreed generally by the judges in the exchequer-chamber in the case of the earl of Holderness (b).

But if there be two brothers, the elder is attaint and have issue, and dies in the life of the younger, and then the younger die without issue, the lands in fee simple of the younger shall not descend to the nephew, for the attainer of his father is an impediment to the derivation of his descent.

And accordingly it is, if the son of the person attaint purchases lands and dies without issue, it shall not descend to his uncle, for the attainer of his father corrupted his blood, whereby the bridge is broken between the nephew and uncle, and the one cannot inherit the other, but the land shall eschete *pro defectu hæredis*: vide accordant ruled in Courtney's case infra Co. P. C. p. 241.

Thus far for corruption of blood.

Touching restitutions in blood they are of two kinds, by [358] pardon, and by act of parliament.

The king's pardon, tho it doth not restore the blood, yet as to issues born after it hath the effect of a restitution.

(b) P. 16 Car. 2. reported by the name of Collingwood and Pace, 1 Sid. 193,
1 Fin. 413.

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A. hath issue *B.* a son, and then is attaint of treason or felony, and then is pardoned and purchaseth land in fee simple, and then hath issue *C.* if *A.* dies, and *B.* survives, and after dies without issue, yet the land shall eschete *pro dæfectu heredis*, for the pardon restores not the blood between *A.* and *B.* that was born before; but if *B.* had died without issue in the life of *A.* and then *A.* had died, the land should descend to *C.* because he was not in being while his father's attainder stood in force, but was born after the purging of the crime and punishment by the pardon. *Co. Litt.* §. 747.

But restitution of blood in its true nature and extent can only be by act of Parliament.

Restitutions by parliament are of two kinds, one a restitution only in blood, which only removes the corruption thereof, but restores not to the party attaint or his heirs the manors or honours lost by the attainder, unless it specially extend to it; the other is a general restitution not only in blood, but to the lands, &c. of the party attaint.

A restitution in blood may be special and qualified, but generally a restitution in blood is construed liberally and extensively.

A. hath issue *B.* a son, and is attaint of treason and dies, *B.* purchaseth land in fee simple, *B.* by parliament is restored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal ancestors, provided it shall not restore *B.* to any of the lands of *A.* forfeited by the attainder, *B.* dies without issue; it was ruled, that the lands of *B.* shall descend to the sisters of *A.* as aunts and collateral heirs of *B.* 1. Because the corruption of blood by the attainder is removed by the restitution. 2. Altho the words of the act of restitution be to restore *B.* only as heir to *A.* &c. yet this doth not only remove the corruption of blood, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes that impediment, which would have hindred the descent to them. *Co. P. C. cap. 106.* *Courtney's case.*

[359] It appears *Rot. Parl.* 25 E. 3. n. 54, 55. that *John Matravers*, that was attainted of treason in 4 E. 3. obtaind letters patent from the king of restitution in blood, but it was not effectual, and therefore there is enacted a general restitution as well in blood, as to his land by a charter enacted and confirmed in parliament, namely by the king with the consent of the lords at the petition of the commons.

II. As to the second matter, namely the forfeiture of the wife's dower.

At

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At common law the husband being attainted of treason or felony the wife should lose her dower, tho it were dower assigned *ad officia ecclesiastæ* or *ex offensu patris*, *Co. Litt.* §. 41. p. 37. *ibidem* §. 747. but not upon attainder of misprision of treason; but by the statute of 1 *E. 6. cap. 12.* and 5 *E. 6. cap. 11.* tho her husband be attainted of felony or murder, she shall not lose her dower.

But by attainder of her husband of high treason or petit treason the wife shall lose her dower at this day, unless in case of attainders of such treasons, where by special provision of parliament the wife's dower is saved, as upon the statutes of 5 and 18 *Eliz.* touching coin.

But if the husband seised in right of the wife hath issue by her, and then the wife commits treason, and is attainted and dies, it seems the husband shall be tenant by the courtesy, otherwise it were, if the treason were committed before issue had: *vide Co. Litt.* §. 35.

III. As to the third thing, namely the forfeitures, that happen by attainder, they are of these kinds, of lands, or of goods and chattels, or of dignities and honours.

1. As to the forfeiture of lands, generally the lands of all persons attainted of treason belong to the king, but by special privilege they may belong to a subject, as in case of the bishop of *Durham*, &c. *de quo supra* p. 254. &c.

If at common law tenant in tail were attainted of treason, or at this day be attainted of felony, tho the inheritance neither eschete nor be forfeited, yet the king hath (upon office found) the freehold [360] during the life of the tenant in tail, and not barely a pernancy of profits: adjudged *T. 29 Eliz. Clenche's rep. Venable's case, and 3 Leon. n. 236. (c) Co. Litt.* §. 747. and the same law it is for tenant of life attaint.

But an attainder of treason or felony of a copyholder gives the king no forfeiture, but regularly it belongs to the lord, unless special custom be to the contrary.

By the custom of *Kent*, if the ancestors be attaint of felony and executed, yet his lands shall not eschete but descend to the heir; but if he be attaint by outlawry, or abjure, they are not privileged by the custom from eschete.

But if he be any way attaint of treason, yet the forfeiture thereof belongs to the king notwithstanding that custom. 8 *E. 2. Prescription* 50. *Lambard's Perambulatio Kantiæ*, p. 551.

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If the tenant hold lands of a common person, and commit treason, and be attaint, yet the forfeiture belongs to the king of common right, as a royal eschete; but if such person commit felony or petit treason and be attaint, the lands eschete to the lord, of whom they were immediately held, only the king shall have the year, day, and waste of the tenement so escheted for felony or petit treason. *Stamf. Prerogativa Regis, cap. 16. (d).*

The commencement of this year and day is neither from the attainer nor from the death of the party attaint, but from the time of the inquisition found, tho the same be not found for many years after the death of the person attaint. 49 E. 3. 11.

If tenant in tail or for life, or the husband seised in right of his wife be attaint of felony, the king shall have the year, day and waste against the wife, the issue in tail, and him in reversion. *Stamf. P. C. Lib. III. cap. 30. (e). 3 E. 3. Coro. 327*, but of this more hereafter.

The relation of the forfeiture or eschete of lands for treason or felony to avoid all mesne incumbrances is to the time of the offense committed.

A. and *B.* joint tenants in fee, *A.* is attaint of treason or felony [361] and dies, the land survives to *B.* but yet subject to the title of the forfeiture. *H. 10 Car. Ret. 342. B. R. Harrison and Walden.*

If a man seised in fee alien, and then be attaint of treason or felony by confession or abjuration upon an indictment supposing the felony committed before the alienation, the alienee may not only falsify the attainer in the point of the time of the felony supposed, but also in the very point of the felony or treason itself, and is not concluded by the confession of the alienor, tho the alienor himself be concluded. 49 E. 3. 11. 7 E. 4. 1. *Co. P. C. cap. 104. p. 231.*

But if he be attaint of felony or treason by verdict upon an indictment, supposing the offense before the alienation, tho the alienee cannot falsify the attainer by supposing there was no felony committed, yet he may falsify it as to the point of time, *viz.* he may allege contrary to the indictment, that the felony or treason was committed after the alienation, and not before, *Co. P. C. ubi supra 32 Eliz. Syer's case.*

If a man be indicted of a felony or treason supposed the 1st of April 24 Car. and in truth it was committed 1 *Junij* 24 Car. yet he shall

(d) See *Mug. Chars. cap. 22. 2 Co. Inst. 36.*

(e) 190 b.

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be convicted notwithstanding that variance, for the day is not material; yet in such case for the avoiding of the danger and trouble, that may ensue by the relation of such attainer to the day mentioned in the indictment, it is fit for the jury to find the true day: *vide Syer's case, ubi supra.*

If a man be outlawed upon an indictment of felony or treason, and pending the process he alien the land, yet the king or lord shall have the land, which he held at the time of the felony committed, for the indictment contains the year and day, when it was done; unto which the attainer by outlawry relates.

But if a man sue an appeal by writ of felony or murder, and pending it the party aliens, and then is outlawed before appearance, the lords eschete is lost, because it relates only to the time of the outlawry pronounced, in as much as the writ of appeal is general, and contains no certain time of the offense committed, cited to be adjudged 5 E. 6. Co. Litt. §. 4. fol. 13. a.

But it seems, that if the defendant had appeared and the plaintiff had declared upon his writ, and the defendant had [362] been convict and attaint by verdict or confession, or if the appeal had been by bill, and thereupon the party had been outlawed, tho before appearance, the eschete had related to the time of the fact committed to avoid mesne incumbrances, for in the declaration in the one case, and in the bill in the other case, the year and day of the felony is set forth.

Touching forfeiture of goods.

The goods of a person convict of felony or treason, or put in exigent for the same, or that fled for these offenses, or that stands mute, are forfeit to the king.

But the relation of these forfeitures refer not to the time of the offense committed nor to the time of the flight, but only to the conviction or to the time presented, or to the time of the exigent awarded.

And therefore an alienation made by the felon or traitor, or person flying *bonâ fide* and without fraud, mesne between the offense or the flight, and the conviction or presentment of the flight is good, and binds the king, but if fraudulent, then it is avoidable by the statute of 13 Eliz. cap. 5. 3 E. 3. Coron. 296. *ibidem* 344.

If a man commits a felony and be pursued, and in the flight be killed, whereby he can neither be indicted nor convict, yet if this matter be found by inquisition before the justices in *eyre* or of *oyer* and

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and *terminer*, he shall forfeit the goods he had at the time of the flight, and not those only, which were his at the time of the inquisition found, for there it must relate to the flight, because the party is dead, and can be no farther proceeded against, 3 E. 3. *Coron.* 290. 312.

If a party be acquitted of treason or felony, the jury that acquits him ought to enquire of his flight for it, and if they find he fled, what goods he had, for his goods and chattels are thereby forfeited; but this is but an inquest of office, and therefore is traversable by the party: *vide Stamf. P. C. Lib. III. cap. 21. (f).*

[363] But upon an inquisition before the coroner of the death of a man *super visum corporis*, tho the party accused be acquitted, yet if it be presented, that he fled for it, it is doubted whether that inquisition as to the flight be traversable: *vide Stamf. P. C. Lib. III. cap. 21.*

But on all hands it is agreed, that if the coroner upon the inquest *super visum corporis* presents one as guilty, and that he fled for it, and the party is arraigned and found not guilty, and also that he did not fly, yet that doth not avoid the first inquisition as to the flight, but the best shall be taken for the king, though both are in the nature of inquests of office. 22 *Aff.* 96. *Forfeitures* 27. 3 E. 4. *Forfeitures* 35. H. 13 H. 4. *Forfeitures* 32. 7 *Eliz. Dy.* 238. b.

A *fugam fecit* by the principal or accessary *before*, in murder, if the fact be presented before the coroner, entitles the king to the goods of the offender, for these are within the cognizance of the coroner, but the coroner hath no power to enquire of accessaries *after*, nor consequently of their flight, and therefore a presentment before the coroner of the flight of an accessary *after* gives the king no title to the goods. 4 H. 7. 18.

The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are, and thereupon to charge the *Villata* where such goods are with the goods to be answerable to the king: *vide 3 E. 3. Coron. 296. &c alibi, vide Statute 31 E. 3. cap. 3.*

But tho the goods of an offender be not forfeited till the conviction or flight found by inquest, yet whether they may be seized upon the offense committed, hath been controverted.

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1. It seems clear, that at common law if a man had committed felony or treason, or tho possibly he had committed none, yet if he had been indicted or appealed by an approver, the sheriff, coroner, or other officer could not seize and carry away the goods of the offender or party accused.

2. Again, he could not in that case have remoyed the [364] goods out of the custody of the offender or party accused, and deliver them over to the constables or to the *Villata* to answer for them. 13 H. 4. 13.

3. But if the party were indicted or appealed by an approver, the sheriff, or other officer might make a simple seizure of them only to inventory and appraise them, and leave them in the custody of the servants or bailiff of the party indicted, in case he would give security against their being imbezzled, or in default thereof he might deliver them to the constable or *Villata* to be answerable for them, but yet so that the party accused and his family have sufficient out of them for their livelihood and maintenance (g), viz. *Salvis capto & familiæ suis necessariis estoveriis suis, & si captus convictus fuerit de feloniam unde retiatus est, residuum bonorum ultra estoverium illud regi remaneat.* Bract. Lib. III. 123. Fleta, Lib. I. cap. 26. 43 E. 3. 24. 44 Aff. 14. Stamf. P. C. Lib. III. cap. 32. Co. P. C. 228, 229.

4. And possibly the same law was, tho he were not indicted or appealed, but *de facto* had committed a felony, but with this difference, if he had been indicted or appealed by an approver, this kind of seizure might have been made, whether he committed the felony or not; for in the books of 43 E. 3. and 44 Aff. there is no averment, that the felony was committed, but only that he was thus *accused* of record, and so is the book of 13 H. 4. 13.

But in case there were no indictment, then it is at the peril of him that seiseith, if he committed not the felony, and therefore it is issuable.

Now touching alterations by the statutes after made.

It seems, that by the statute of 5 E. 3. cap. 9. and the ensuing statutes, whereby it is enacted, that no man's goods shall be seized into the king's hands without indictment or due process of law, that it was held, that this kind of seizure of the goods of a person accused of felony, tho it be only *in custodiam & causa rei servandæ*, hath been held unlawful, if the person were not first indicted, or at least appealed

(g) See *Scars Tr. Vol. IV. p. 615.* Sir W. Parkin's case.

by

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by an approver; and so the books seem to import of 43 E. 3. 24. and 13 H. 4. 13. and expressly my lord *Coke*, *P. C. cap. 103. p. 228.*

By the statute of 25 E. 3. *cap. 14.* where a party is indicted of felony, the process directed by that statute is first a *capias*, and if he be not found a second *capias* together with a precept to seize his goods, and if he be not found then, an exigent and the goods to be forfeit.

And this is more than a simple seizure, such as was before at common law, for if the party came not in, his goods are forfeit upon the award of the exigent; and if he came in, tho his goods be saved, yet there is no direction for delivering his goods upon security; but it seems the sheriff is to take them into his custody, and yet out of them must allow sufficient for the sustenance of the prisoner and his family.

Quære. Whether in the case of such a seizure, a sale for a valuable consideration before conviction and after seizure do not bind the king, as it seems it doth in a case of seizure and delivery to the *Villata*: *vide 8 Co. Rep. 171. Fleetwood's case.*

This statute extends as well to treason as to felony, and yet it mentions only felony, and therefore at this day the exigent goes out upon the second *Capias* returned *non inventus*, as well in treason, as felony.

By the statute of 1 R. 3. *cap. 3.* it is enacted, "That neither sherrif, &c. nor other person take or seize the goods of any person arrested or imprisoned before he be convict of the felony according to the law of England, or before the goods be otherwise lawfully forfeited, upon pain of forfeiting the double value of the goods so taken."

Mr. *Stamford* thinks this is but an affirmation of the common law, only that it gives a penalty, but it seems to be somewhat more than so, for this prohibits the seizure of the goods of a party imprisoned, tho he were also indicted, but not yet convicted, where unquestionably the common law allowed such a seizure, as is before declared, if the party or his friends did not secure the forth-coming of the goods, where the party was indicted.

But upon this statute these things are considerable.

[366] 1. Whether it extends to treason; it seems it doth, for as all treason is felony and more, so in a statute of this nature for advancing of justice it seems comprised in it, for it is within the reason of the law, and *vide Co. P. C. p. 228.* tho I know it was otherwise held, or at least doubted in the case of Sir *Henry Vane*, whose rents were stopt in the tenants hands, and no precept was granted

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granted for their delivery, tho before conviction, yea and before the indictment, tho after imprisonment 1661.

2. Whether it extends to a party, that is at large and out of prison, whether indicted or not indicted, and as to that, 1. It seems clearly, that it doth not repeal the statute of 25 E. 3. cap. 14. touching the second *Copias* with a seizure of goods. But 2. As to other persons, that are at large and not indicted, nor process, as before, made upon their indictment, it seems to me, that if they fly not, there can be no seizure at all made, whether they are indicted or not, for the statute did not intend a greater privilege to a party imprisoned for an offense of this nature, then he that is at large. 3. That if he be at large and fly for it, yet his goods cannot be seized and removed, whether he be indicted or not indicted. 4. That if he be indicted and at large, yet the goods cannot be removed, but only viewed, appraised, and inventoried in the house or place, where they lie. 5. That altho the goods may not be removed, because the statute now hath taken away that removal, that was in some cases at common law, yet neither in case of treason nor in case of felony, where the party is at large, is it within the penalty of the statute as to the point of forfeiture of the double value, for as to that the statute is penal, but it is within the directive and prohibitory part of the statute, which by an equal construction and interpretation prohibits the thing to be practised, and hath altered the law as to the removing of the goods of the party before conviction.

And yet I know not how it comes to pass, the use of seizing of the goods of persons accused of felony, tho imprisoned or not imprisoned, hath so far obtained notwithstanding this statute, that it passeth for law and common practice as well by constables, sheriffs and other the king's officers, as by lords of franchises, that [367] there is nothing more usual: *vide Dalton's Justice of Peace, cap. 110.* (h) in affirmation of it, viz. that the officer may still take surety, that the goods be not embezzled, and for want of sureties may seize and praise them, and then deliver them to the town safely to be kept, until the prisoner be convict or acquit, and cites for it *Stamf. 192.* 8 *Rep. 171.* and *B. Forfeiture 44.*

It seems the opinion therefore of my lord *Coke, P. C. cap. 103.* hath truly stated the law, at least as it stands upon the statute of 1 *R. 3.*

(b) *New Edis. cap. 163. p. 538.*

1. That

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1. That before the indictment the goods of any person cannot be searched, inventoried, nor in any sort seized.
2. That after indictment they cannot be seized and removed, or taken away before conviction or attainder; but then it may be said, to what purpose may they be searched and inventoried after indictment, if they may not be removed, but are equally liable to embezzling as before.

I think he is not bound to find sureties, neither hath the officer at this day any power to remove them in default of sureties, and commit them to the vill, but only to inventory them and leave them where he found them, (unless in case of the second *Capias*, whereof before) for the prisoner or party indicted may sell them *bonâ fide*; and if he may do so, the vendee may take them, and the *Villata* cannot refuse the delivery of them to the vendee, tho the goods had been delivered to them.

But there is this advantage by the viewing and appraising, that thereby the king is ascertained what the goods are, and may pursue them that take or embezzle them, by information, (if the party happen to be convict) and try the property with them, whether they are really sold, or sold only fraudulently without valuable consideration to prevent the forfeiture, and so forfeited by the statute of 13 *Eliz.* cap. 5. notwithstanding such fraudulent sale.

IV. Lastly, touching execution of judgments of treason, they are directed by the judgment, whereof before.

There be nevertheless some things, that accidentally happen, [368] that suspend or abate the execution.

1. Reprieves *ex arbitrio regis vel judicis*, the king may by command or precept under his great or privy seal, privy signet, or sign manual, yea by signification under the hand of the secretary of state, or at this day by the subscription of a master of requests, command the reprieve of one condemned of treason or felony.

And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treason before him, yet he may, upon due circumstances do it, as well in case of treason, as felony.

And this reprieve he may grant, and after he hath granted it may command execution after the sessions and adjournment of the commission. *Dy.* 205.

There are other reprieves, which are not arbitrary, but *quasi de jure*.

1. In

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1. In respect of pregnancy, for tho pregnancy be no plea to delay judgment, yet it is a plea to delay execution, and therefore whenever any judgment in treason or felony is given against a woman, it is the duty of the judge, before he finish his sessions, to demand of her what she can allege why execution should not be made; yea in all cases, where a prisoner attaint is brought into another court, or reprieved to another sessions, he ought not to have any award of execution against him, till he be first demanded, what he can say, why it should not be, for possibly he may have a pardon after judgment. 22 *Aff.* 71.

This plea of pregnancy *in retardationem executionis* hath these incidents to it: 1. She must be with child of a quick child. 2. If it be alleged, the judge, before whom it is alleged, must impanel an inquest of women *ex officio* to enquire of the truth of her allegation, *viz.* whether she be with child of a quick child, and if they find she is, then her execution is to be respite, if not, she is to be executed.

If it be found by the jury of women, that she is so with child, some have used to command a respite of her execution till a convenient time, for instance a month after her delivery, and then to be [369] executed; but this seems irregular, for she may have a pardon to plead, and therefore it is to be respite till another sessions. 12 *Aff.* 10.

If she have once had the benefit of this reprieve and be delivered, and afterwards be with child again with another quick child, she shall not have the benefit of a farther respite of the same judgment for that cause: *quod vide* 23 *Aff.* 2. *Coron.* 188. 22 *E. 3. ibidem* 253.

If the jury of women be mistaken in their verdict, and find her quick with child, where in truth she was not at all with child, (as once it happened at *Alesbury*) if the next sessions of goal-delivery, or *oyer et terminer* happen at that distance, that it is impossible by the course of nature, that she could be with child, but she must be delivered mesme between the former sessions and this, as if it were ten months, &c she shall be executed; but if the second sessions happen within such time after the first, that by course of nature she may still continue with child, as if it be within the distance of six months or the like, then she shall continue under the first reprieve till another session, *nam licet tempus ordinarium vitalis fœtus sit post 16. vel 18. septimanas post impregnatam, tamen in quibusdam citius contingere potest juxta medicorum placita.*

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If in truth she were not with child with a quick child at the time, when the jury gave their verdict, but became quick after, nay tho she were not at all with child then, but became with child before the time of the second session with a quick child, in my opinion she shall have a second reprieve by reason of pregnancy, for the advantage that she had at first was not really because of pregnancy, but by a mistake of the jury of women, and therefore *in favorem prolis* she shall now have it.

And therefore, as hath been said, in all cases of reprieves for pregnancy the judge ought to make a new demand, what the prisoner hath to say, wherefore execution should not be awarded, for the first respite being by a kind of matter of record shall not be determined without a new award of execution; and altho clerks of assizes enter those respites and awards only in a book of *Agenda*, yet regularly they are supposed to be entered of record, and these memorials are warrants for such entries, tho *de facto* it be not usually done.

Another cause of regular reprieve is, if mesme between the judgment and the award of execution the offender become *non compos mentis* (i), the judge in that case may both in case of treason and felony swear a jury to inquire *ex officio*, whether he be really so, or only feigned or counterfeit; and thereupon if it be found that he be really distracted, must award a reprieve *de jure* till another sessions, *Co. P. C. p. 4.* and the statute of *33 H. 8. cap. 20.* that directed an execution of parties convict of treason notwithstanding insanity intervening after judgment is repealed, by *1 & 2 P. & M. de quo supra p. 283.*

Now as to the abating of some parts of the execution in case of high treason, as drawing, hanging, evisceration and quartering, and leaving the offender only to be beheaded, this may be, and usually is by the king's warrant under his great seal, privy seal, yea or his privy signet, or sign manual, as usually is done in case of noblemen or great men falling under that judgment, for one part of the judgment, *viz.* decollation, and the substance of the whole judgment, *viz.* the death of the party, is performed.

(i) See Sir John Hawle's remarks on the trial of Charles Bettman, *State Tr. Vol. IV. p. 204.*

CHAP. XXVIII.

Touching the crime of misprision of treason, and felony, &c.

THO the order proposed in the beginning should refer misprision of treason to that series of offenses, that are not capital, yet because this offense hath relation to treason, and may be of use to explain the nature of it, I shall here take it into consideration, referring misprision in its large and comprehensive nature to its proper place.

Misprision of treason is of two kinds.

1. That which is properly such by the common law.
2. That which is made misprision of treason by act of parliament.

Misprision of treason by the common law is, when a person knows of treason, tho no party or consenter to it, yet conceals it and doth not reveal it in convenient time.

Tho' some question was antiently, whether bare concealment of high treason were treason, yet that is settled by the statute of 5 & 6 E. 6. cap. 11. and 1 & 2 P. & M. cap. 10. viz. that concealment or keeping secret of high treason shall be deemed and taken only misprision of treason, and the offender therein to suffer and forfeit, as in cases of misprision of treason, as hath heretofore been used: tho in the time of *Henry VIII.* and *Edward VI.* some things were made misprision of treason, that were not so formerly, yet by the statute of 1 Mar. cap. 1. it is enacted, that nothing be adjudged to be treason, petit treason, or misprision of treason, but what is contained in the statute of 25 E. 3. and altho that act of 25 E. 3. do not make or declare misprision of treason, yet it doth it in effect by declaring and enacting what is treason, which is the matter or subject of misprision of treason, tho the misprision or concealment thereof be [372] a crime, which the common law defines what it is.

Therefore since the statute of 25 E. 3. is by the statute of 1 Mar. cap. 1. made the standard of treason, it remains to be enquired, what shall be said the concealment of such a treason according to the reason and rule of the common law.

If a man knew of a treason, by the old law in *Bracton's* time he was bound to reveal it to the king or some of his council within two days, *quod si ad tempus diffimulaverit & substicuerit, quaq[ue] consciens*

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tiens, & assentiens erit seductor domini regis (a); but at this day it is but misprision, if he reveals it not as soon as he can to some judge of assize, or it seems to some justice of peace, for tho the crimes of treason or misprision of treason be not within the commission of a justice of peace to hear and determine, yet, as it is a breach of the peace, the justices of peace may take information upon oath touching it, and take the examination of the offenders and imprison them, and bind over witnesses, and transmit these examinations and informations to the next sessions of gaol-delivery or eyer and terminer to be further proceeded upon as is truly observed by Mr. Dalton (b), cap. 90. nay, I have known chief justice Rolls affirm, that justices of the peace may take an indictment of treason, tho they cannot determine, *viz.* as an information or accusation tending to the preservation of the peace.

But some treasons enacted by some statutes are limited to be heard and determined by them, as appears in some of the statutes before mentioned, p. 350.

It is said 3*H.* 7. 10. *Stamf.* 38. a. *Dalton,* cap. 89. (c), the uttering of false money known to be false is misprision of treason; but it is a mistake; indeed it is a great misprision, but not misprision of treason, unless the utterer know him that counterfeited it, and conceal [373] it, this indeed is misprision of treason, but not the uttering of it, for the money is not the traitor, but he that counterfeited it, and his counterfeiting is the treason.

As all treasons and declarations of treasons between 25 *E.* 3. and 1 *Mar.* are repealed by 1 *Mar.* cap. 1. so consequently all misprisions of any other treason not contained in 25 *E.* 3. are thereby repealed, *Coke P. C.* p. 24. hath these words, *Misprision of treason is taken for concealment of high treason or petit treason, and only of high treason or petit treason specified and expressed in the act of 25 E. 3. and in the margin, that is of such treason high or petit, as is expressed in the act of 25 E. 3. and of no other treason;* and accordingly uttering of counterfeit coin was agreed by the court (d) at Newgate, August 1661. to be neither treason or misprision of treason within the statute of 25 *E.* 3. but only punishable with fine and imprisonment; *ex libra domini Bridgman manu sua scripto.*

(a) *Brah. Lib. III. de corona, cap. 3.*

(b) *New Edit. cap. 141. p. 460.*

(c) *New Edit. cap. 140. p. 452.*

This last book says it is misprision of trea-

fon, but the other two only say it is a mis-

prision.

(d) In the case of *Richard Ober,* *Kel. 33.*

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If a subsequent act of parliament after 1 Mar. make a new treason, the concealment of such a treason is certainly misprision of treason for these reasons, 1. Because misprision of treason is not any substantive crime of itself, but relative to that, which is, or is made treason, and a kind of necessary consequent and result from it, as the shadow follows the substance. 2. And hence it is, that tho the statute of 25 E. 3. does not by express words enact misprision of treason to be an offense, yet treasons being settled by that act, the statute of 1 Mar. cap. 1. enacts there shall be no misprision of treason but what is enacted by the statute of 25 E. 3. for tho that act speaks not of misprision of treason, yet settling those things that are treason, it doth virtually and consequentially make the concealing of any of them misprision of treason; but yet farther, when the act of 1 & 2 P. & M. cap. 10. enacts divers new treasons, tho it enacts nothing to make the concealment thereof misprision, yet in the proviso abovementioned it takes notice, that concealment of any of these treasons would be at least misprision of treason, and therefore provides that the concealment thereof shall not be adjudged treason, [374] but only misprision of treason, any thing above-mentioned to the contrary thereof notwithstanding; and the like clause is in the abovementioned statute of 5 & 6 E. 6. cap. 11. Again, my lord Coke, P. C. cap. 65. p. 139. says, *As in case of high treason, whether the treason be by the common law or statute, the concealment of it is misprision of treason; so in case of felony, whether the felony be by the common law or by statute, the concealment of it is misprision of felony;* so that certainly, if a felony or a treason be enacted by a new law, the concealment of the former falls under the crime of misprision of felony, and the latter under the crime of misprision of treason, as a consequent of it without any special words enacting it to be so.

All treason is misprision of treason and more, and therefore, he that is assisting to a treason, may be indicted of misprision of treason, if the king please. *Stamf. P. C. 37. b. Co. P. C. 36. 2 R. 3. 10. b.*

Altho the statute of 1 & 2 P. & M. cap. 10. hath as to treasons repealed the statute of 33 H. 8. cap. 23. for trying treasons in one county committed in another, yet it hath not repealed the same statute as to the trial of murder and misprision of treason, which may yet be tried according to the statute of 33 H. 8. cap. 23.

In case of misprision of treason and misprision of felony, as well

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as in case of treason or felony, or accessory thereunto a peer of this kingdom shall be tried by peers, but the indictment is to be by a common grand inquest. 2 Co. Inst. 49.

The judgment in case of misprision of treason is loss of the profits of his lands during his life, forfeiture of goods, and imprisonment during life.

By what hath been said touching misprision of treason we may easily collect what is the crime of misprision of felony, namely, that it is the concealing of a felony which a man knows, but never consented to, for if he consented, he is either principal or accessory in the felony, and consequently guilty of misprision of felony and more.

The judgment in case of misprision of felony in case the concealer [375] be an officer, as sheriff or bailiff, &c. is by the statute of Westminster. 1 cap. 9. (e) imprisonment for a year and ransom at the king's pleasure; if by a common person, it is only fine and imprisonment.

And note once for all, that all those acts of parliament, that speak of fines or ransoms at the king's pleasure, are always interpreted of the king's justices: *wide Co. Magna Carta super stat. Westminst. 1 cap. 4. in fine (f) & saepius alibi. 2 R. 3 11. a. voluntas regis in curia, not in camera.*

And it seems, that misprision of petit treason is not subject to the judgment of misprision of high treason, but only is punishable by fine and imprisonment, as in case of misprision of felony.

II. I come to misprisions of treason so enacted by acts of parliament since 1 Mar. cap. 1. for, as before is observed, by that act all misprisions, that by any statute made after 25 E. 3. are either expressly or consequentially made misprisions of treason, are repealed and set aside.

All acts of parliament, that after 1 Mar. enacted any thing to be high treason, do consequentially make the concealment thereof to be misprision of treason, tho' it do not in express words enact the concealment thereof to be misprision of treason, as hath been before shewn, and the like in case of felony.

And consequently those acts of parliament, which enacted temporary treasons, as the statute of 1 & 2 P. & M. cap. 10. the act of 1 Eliz. cap. 5. &c. so far forth as they are temporary, the misprisions of such treasons are also temporary, and expire with the act, and

(e) 2 Co. Inst. 172.

(f) 2 Co. Inst. 168,

where

where the acts of treason are perpetual, or being but temporary are made perpetual by some other act of parliament, the misprision of such treasons remains such, as long as the act of parliament making such treason continues, or is continued, as upon the statutes of 5 Eliz; and 18 Eliz. 1 Mar. touching counterfeiting of foreign coin made current by proclamation, or clipping or washing coin.

And the like is to be said in all respects of misprision of felony made so by act of parliament.

But besides these crimes, that are consequentially misprision [376] of treason, some offenses are made misprision of treason, as a kind of substantive offense, and not consequential upon the making of treason, but particularly enacted.

Those of that kind, that are perpetual and have continuance, are as follow:

14. Eliz. cap. 3. "They that counterfeit foreign coin of gold or silver "not permitted to be current in this kingdom, their procurers, aiders, "and abettors shall suffer, as in case of misprision of treason.

And note, that in that act (*aiders*) are intended of aiders in the fact, not aiders of their persons, as receivers and comforters, for, as hath been observed p. 236. in some acts of parliament *aiders* being joined with procurers, counsellors and abettors are intended of those, that are aiding to the fact; but in other acts of parliament, where the word *aiders* is joined with maintainers and comforters, it is intended of those, that are aiders *ex post facto* to their persons; see this difference in the penning of several acts of parliament, for the first part 5 Eliz. cap. 11. 18 Eliz. cap. 1. 1 Mar. Jeff. 2. cap. 6. touching coin, and for the second part this express distinction observed 13 Eliz. cap. 2. touching publishing of bulls of absolution, where the former kind are enacted to be traitors; the second incur a *præmunire*; the like 23 Eliz. cap. 1.

13 Eliz. cap. 2. "If any bull or absolution, or instrument of re- "conciliation to the see of Rome be offered to any person, or if any "person be moved or perswaded to be reconciled, if he conceal the "said offer, motion or perswasion and doth not discover or signify it "by writing or otherwise within six weeks to some of the privy "council, &c. he shall incur the penalty and forfeiture of misprision "of treason, and that no person shall be impeached for misprision of "treason or any offense made treason by this act, other than such as "are before declared to be in case of misprision of treason;" *nota*, had

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it not been for this cause the concealment generally of any treason within this act had been misprision of treason.

[377] 23 Eliz. cap. 1. "All persons, that shall put in practice to absolve or withdraw the subjects of the queen from their obedience, or to that end perswade them from the religion here established, or if any person shall be so absolved, every such person, and their counsellors and procurers thereunto, shall be adjudged guilty of high treason.

" And all persons, that shall wittingly be aiders and maintainers of such person so offending, or any of them, knowing the same, or which shall conceal any offense aforesaid, and not reveal it within twenty days after his knowledge thereof to some justice of peace, or other higher officer, he shall suffer and forfeit, as in misprision of treason.

Blackf. Com. lib. iv. ch. ix. page 119, 120, 121, &c. 1 Hawk. P. C. ch. xx. &c. ch. lix. 4 Burn. tit. treason, p. 302. 2 Burn. tit. felony, p. 178. Edit. 1776. Foster 341.

C H A P. XXIX.

Concerning petit treason.

AS at common law there was great uncertainty in high treason, so there was in petit treason.

It is true, that all the petit treasons declared in this statute (*a*) were petit treasons at common law, as for a servant to kill his master or mistress, 12 Aff. 30. a woman to kill her husband, as appears 15 E. 2. Corone 383, and the judgment was the same at common law in such cases, as now, and the lands of him, that was attaint of petit treason, escheted to the mesne lord, of whom they were held, 22 Aff. 49. so that as to these things the act of 25 E. 3. was but an affirmation of the common law.

But yet there were certain offenses, that were petit treason at common law, that are restrained and abrogated by this statute from being petit treason.

[378] 15 E. 2. Corone 383. A woman intending to kill her husband beat him so, that she left him for dead, but yet he recovered, for this attempt the wife had judgment to be burned.

(d) v. 25 Edw. 3.

Fleta,

Fleta, Lib. I. cap. 22. Britton, cap. 8. If the hornager or servant falsify the seal of his lord, or had committed adultery with the lord's wife or daughter (*b*), it was petit treason.

But these are taken away by this act of 25 E. 3. and are reduced only to these three ranks:

1. The servant killing his master or mistress.
2. The wife killing her husband.
3. The clergyman killing his prelate or superior, to whom he owes faith and obedience.

All petit treason comes under the name of felony, and a pardon of all felonies, where petit treason is not excepted, at common law pardoned petit treason, and so at this day doth a pardon of murder.

A man or woman, that commits petit treason, may be indicted of murder, but if all felonies, &c. are pardoned by act of parliament, wherein there is an exception of murder, it seems that a murder, which is a petit treason also, is discharged and not within the exception. *M. 6 & 7 Eliz. Dyer 235^b (c)*

The killing of a master or husband is not petit treason, unless it be such a killing, as in case of another person would be murder, and therefore upon an indictment of petit treason for a servant killing his master, if upon the circumstances of the case it appears to be a sudden falling out, and the servant upon a sudden provocation kills his master, which, in case it had been between other persons, had been only manslaughter, the jury may acquit him of petit treason, and find him guilty of manslaughter; and thus it was once done before me at *Dorchester assizes*, and another time before justice *Windham* at *Coventry assizes*, tho the indictment were for petit treason.

If a wife conspire to kill her husband, or a servant to kill his master, and this is done by a stranger in pursuance of that conspiracy, [379] it is not petit treason in the servant or wife, because the principal is only murder, and the being only accessory, where the principal is but murder, cannot be petit treason; but if the wife and a servant conspire the death of the husband, being his master, and the servant effect it in the absence of the wife, it is petit treason in the servant, and she is accessory before to the petit treason, and shall accordingly be indicted and burnt *P. 16 Eliz. Dy. 332. a. 40 A. 25.*

(b) *Britton adds, or the wives of his children.*

(c) The reason of this is, because petit treason is an offence of another species, 6 Co. Rep. 13, b. but then by the same reason

a pardon of murder does not include a pardon of petit treason, nor can one guilty of petit treason be indicted of murder. See *Rees versus Griffe, State Tri. Vol. VI. p. 214, 226.*

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If the servant and a stranger, or the wife and a stranger conspire to rob the husband or master, and the servant or wife be present and hold the candle, [while the husband or master is killed*], the stranger is guilty of murder, and the wife or servant guilty of petit treason as principal, because present. 2 & 3 P. & M. Dy. 128. a.

So that the statute of 25 E. 3. doth not only extend to the party, that actually commits the offense, but also to those that were procurers, aiders or abettors, *scilicet*, if they be present, they are guilty of petit treason as principals, if absent, yet if the offense in the principal be petit treason, the offense in the accessory *before* is petit treason, as accessory, as in *Brown's case*, Dy. 332. a.

If a wife or a servant intending to poison or kill a stranger, and missing the blow the wife by mistake kills or poisons her husband, or the servant his master, this, that would have been murder, if it had taken effect against the stranger, becomes petit treason in the death of the husband or master. *Plowd. Com.* 475. b. *Crompt. de pace regis* 20. A and *Dalt. cap.* 91. (d); so if he shoot at J. S. and missing him kills his master. *Ibid.*

If the wife or servant conspire with a stranger to kill the husband or master, if the wife or servant be in the same house, where the fact is done, tho not in the same room, it is petit treason in them, and they are principals in law, because in law adjudged to be present, when in the same house; but if they had been absent, then they had been only accessories before the fact to murder. *Crompt. de pace regis* 21. a. *Blechenden's case*.

If the wife or servant command one to beat the husband or master, and he beat him, whereof he dies, if the wife or servant be in the same house, it is petit treason in the wife or servant as principals, but murder in the stranger. *Crompt. 20. b. Plowd. Com.* 475. b.

For whatsoever will make a man guilty of murder will make a woman guilty of petit treason, if committed upon the husband, or the servant, if committed upon the master.

Eadem lex mutatis mutandis for an inferior clergyman in relation to his superior.

But now to descend to particulars.

I. A servant killing his master.

Who shall be said a servant or a master.

* These words are not in the MS. but they are in the case cited from *Dyer*, and the sense plainly requires them. (d) *New Edit. cap.* 142. p 462.

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If the servant kills his mistress or his master's wife, this is petit treason within this act. 19 H. 6. 47. *Plowd. Com.* 86. b. *Co. P. C.* 20. 12 *Aff.* 30.

If a servant, being gone from his master, kills him upon a grudge, that he conceived against his master, while he was in his service, which he attempted while his servant, but was disappointed, it is petit treason. 33 *Aff.* 7. *Plowd. Com.* 260. a. *Co. P. C.* 20.

If a child live with his father as a servant, as if he receive wages from him, or meat and drink for his service, or be bound apprentice to him, and kills his father or mother, this is petit treason at this day. (f)

But if he receives no wages, nor meat and drink for his service, or be not bound apprentice to him, but only is his son and not his servant, and kills his father, this was petit treason at common law. 21 E. 3. 17. b. *per Thorp* (g); but the better opinion is, that it is not petit treason at this day, because this statute of 25 E. 3. shall not in this case be extended by equity: *quod vide Co. P. C. 20. Lambart Justic.* 248. *Crompt* 19. b.

II. The wife killing her husband.

If the husband kill the wife it is murder, not petit treason. [381] because there is subjection due from the wife to the husband, but not *& converso*.

If the wife be divorced from the husband *causâ adulterii vel fœtus*, she is yet a wife within this law, because this dissolves not the *vinculum matrimonii* by our law, for they may cohabit again, but otherwise it is, if they be divorced *causâ consanguinitatis* or *præcontraftis*, for then the *vinculum* is dissolved, they are no more husband and wife.

If A. be married to B. and during that intermarriage A. marries C. tho C. be, as to some purposes, a wife *de facto*, yet she is not a wife within this law, for the second marriage was merely void, tho perchance she may, upon circumstances, be a servant within the former clause, if she cohabit with A. and he finds her necessaries for her subsistence; *tamen quare*.

III. The clergyman killing his prelate, &c.

If a clergyman living and beneficed in the diocese of A. kills the bishop of that diocese, it is petit treason; but if he kills the bishop of the diocese of B. it is only murder.

(f) 1 *Mar. Dafion* 14.

(g) The book says, he was indicted for killing his *mere* (his mother) but *Coke P. C.* p. 30. says it is misprinted, and that it

should be read *majstre*, (*bis master*) for *mme* being abbreviated, (as perhaps it was in the MS. of the year books) may be read either way, tho the last seems the most probable.

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If a clergyman hath a benefice in the diocese of *A.* and after, by dispensation takes a benefice in the diocese of *B.* if he kills the bishop of one diocese or the other, it is petit treason, for he owes and sweats upon his institution canonical obedience to the bishop of each diocese.

If a clergyman beneficed in the diocese of *A.* within the province of *C.* kills his metropolitan, it seems it is petit treason, tho he be not his immediate superior.

If a clergyman be ordained by the bishop of *A.* *in ordinem diaconi, five presbyteri fine titulo*, yet it seems if he kills the bishop it is petit treason, for he professeth canonical obedience upon his ordination.

Concerning proceedings in petit treasons..

In high treason all are principals, but in petit treason there are principals and accessaries, as well before, as after.

If the principal be only murder, as being committed by a stranger, the accessory cannot be petit treason, tho she be a wife or servant.
Dy. 332. Brown's case ubi supra.

[382] But if the principal be petit treason, as being committed by a wife upon her husband, or by a servant upon his master or mistress, if the accessory be of the same relation, *viz.* a servant or wife, the judgment shall be given against the accessory, as in petit treason; but if the accessory, whether before or after, be a stranger, tho such stranger be an accessory to petit treason, yet the judgment shall be as in a case of felony against the accessory, *viz. quod suspenderatur*, for tho he be an accessory to petit treason, which is the principal, yet such accessory being a stranger is not, nor can be guilty of petit treason, because a stranger to the party killed, and neither wife nor servant.

At common law, and by the statute of 25 E. 3. cap. 4. clergy was allowable in case of petit treason, but not in case of high treason; but now by the statute of 23 H. 8. cap. 1. 1 E. 6. cap. 12. clergy is excluded from petit treason, as well as murder, and in the same kind.

If a person arraigned of high treason stands wilfully mute, he shall be convicted as hath been formerly shewn; but if arraigned of petit treason, he stand mute, he shall have judgment of (*) *peine forte & dure*. *Crompt. 19. b. Co. P. C. 217.*

The judgment of a woman convict of petit treason is to be burnt (*b.*), but (by *Stamf. P. C. fol. 182. b.*) in high treason to be drawn

(*) [Peine forte & dure] but now see the Stat. 12. Geo. 3. ch. 20. as to a person, arraigned on any indictment, standing mute.

And 3 Burn. Edi. 1776. p. 214.

(b) The judgment of a woman convict of petit treason (or in case of coin) is still one as in high treason, *viz. to be drawn and burnt.* *Co. P. C. p. 211.* and so is the constant practice.

and

and burnt, unless it be in case of coin, and then only to be burnt, as in case of petit treason.

But the judgment against a man convict of petit treason is to be drawn and hanged, *trahatur & suspendatur per collum.*

Stamford in *P. C.* 182. tells us, that the execution of drawing is to be upon a hurdle, but 33 *Aff.* 7. *Shard* justice commanded, that nothing should be brought, whereupon he should be drawn, *mas que sans cley ou autre chose a deffouh lui soit tray de chivaux hors de la sale,* *ou il avoit judgement, tanque a les fure, &c.* but that severity is disused: he is in such cases drawn upon a hurdle to the place of execution.

And thus far touching petit treason.

4 Blackf. Com. ch. 6. p. 92. ch. xiv. p. 20. 203, 204. Foster. 337, 207, 324. 336.
1 Hawk. P. C. ch. 32. 4 Burn. Edit. 277&c. p. 301.

C H A P. XXX. [383]

Concerning heresy and apostacy, and the punishment thereof.

UNDER the general name of *heresy* there hath been in ordinary speech comprehended three sorts of crimes: 1. *Apostacy*, when a christian did apostatize to *Paganism* or to *Judaism*, and the punishment hereof, as well by the law of this kingdom, as by the imperial laws, seems to have been by death, namely burning. *Brett. Lib. III. de corona, cap. 9. (a).* by the imperial law he was subject to loss of goods, *Cod. de apostatis, tit. 7. lege 1.* but it appears not, whether he were to suffer death, *Ibid. l. 6.* unless he solicited others to apostacy (b). 2. *Witchcraft*, *Sortilegium* was by the antient laws of *England* of ecclesiastical cognizance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by writ *de haeretico comburendo*, *vide Co. P. C. cap. 6. & libros ibi, Extr. de haereticis, cap. 8. §. 5. n. 6.* 3. *Formal heresy*; the old popish canonists define an heretic to be such, *qui male sentit vel docet de fide, de corpore Christi, de baptisme, peccatorum confessione, matrimonio, vel aliis sacramentis ecclesiae, & generaliter, qui de aliquo prædictiarum vel de articulis fidei aliter prædicat, sentit vel doceat, quam docet sancta*

(a) p. 223. b: (b) Then it was capital, *Lit. I. Cod. iii. 7. l. 5.*

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mater ecclesia; and whereas the antient councils and imperial constitutions grounded thereupon kept the busines of heresy within certain bounds and descriptions, as the *Manichees, Nestorians, Eutychians, &c.* *quod vide in Codice, Lib. I. tit. 5. de hæreticis, l. 5.* in the edict of *Theodosius* and *Valentinian*; the papal canonists have by ample and general terms extended heresy so far, and left so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them, but it may be reduced to heresy according to the great generality, latitude, and extent of their definitions and [384.] descriptions, whereof see the glois of *Lindwood* in *titulo de Hæreticis, cap. 1. Reverendissima ad verbum declarantur*: the definition of *Grosstead*, tho somewhat general, is much more reasonable as we have it given by Mr. *Fox, Aës & Mon.* part. 1. p. 420. *Eft sententia humano sensu electa, palam docta, pertinaciter defensa*; but of this more hereafter.

In this busines of heresy, and the punishment thereof, I shall, as near as I can, use this method: 1. I will consider in general who is the judge of heresy according to the common and imperial law. 2. Who shall be said an heretic according to those laws. 3. What the punishment of an heretic is according to those laws: then I shall consider more specially, *viz.* 1. What was the method of the conviction of heresy according to the antient law used in *England* before the time of *Richard II.* and *Henry IV.* And 2. What was the usual punishment of heresy here in *England* before the time of *Richard II.* and *Henry IV.* 3. I shall give an account touching the proceeding against heretics from the beginning of *Richard II.* to the twenty-fifth year of king *Henry VIII.* 4. What is the method of proceeding, and how the law touching heresy, heretics, and their punishment from 25 H. 8. until the first year of queen *Elizabeth*. 5. How the law stood from 1 *Eliz.* to this day touching this matter.

I. According to the common and imperial law, and generally by other laws in kingdoms and states, where the canon law obtained, the ecclesiastical judge was the judge of heresies, and hereby they obtained a large jurisdiction touching it, so that there was scarce any thing, wherein a man dissented from the doctrine or practice of the *Roman church*, but they took the liberty to determine heretical, *qui a recto tramite, & judicio ecclesiae catholicæ detectus fuerit deviare, & is qui dubitat de fide catholicâ*, yea even, *qui despicit & negligit servare ea, que Romana ecclesia statuit vel servare decreverat*: *vide Lindwood de*

de hæreticis in cap. Reverendissimæ ad verbum declarentur, which left and excessive arbitrary latitude in the ecclesiastical judge, and a great servitude and uncertainty upon men subject to their censures: the ecclesiastical judge was either extraordinary, *viz.* certain inquisitors thereunto deputed by the pope, or ordinary, which [385] was the bishop of the diocese, as appears by *Lindwood de hæreticis, cap. finaliter verb. ordinarius in glossa*; (*) only for the more solemnity of the busines of degradation, which accompanied the sentence of heresy upon one in orders before the offender was left to the secular power, there were six, but afterwards three bishops to be present in degradation à *sacris ordinibus*, *viz.* the episcopal, *Presbyteratus*, *Diaconatus & subdiaconatus*, but in *minoribus ordinibus* there was only required the bishop and his chapter, *canonici five clerici, 6 decretal.* *cap. 2.* afterward the business of degradation was reduced to one bishop, *viz.* the ordinary of the place, so far at least as the same respected the *ordo Presbyteratus* and inferior orders.

But I do not find, that by the canon or civil law the declaratory sentence of heresy was necessary in a provincial synod, tho in great cases, especially where a priest was to be degraded, it was most commonly done in a provincial synod, partly for the greater solemnity of the busines, and partly because in such synods more bishops and others of the clergy were present; but how the use was in *England* we shall hereafter see.

II. As to the second, touching heretics and their discriminations according to the canon law, they may be distinguished into three ranks: 1. *Simplex hæreticus.* 2. *Hæreticus contumax.* 3. *Hæreticus relapsus.*

1. A simple heretic was such, as held an heretical opinion, but being convened before the ordinary, and the opinion being substantially declared heretical, and the party convicted thereof, declares his penitence and abjures his opinion, in this case he was dismissed without farther punishment, and this abjuration might be required by the ordinary, and was of two kinds, *viz.* a special abjuration, whereby he abjured that single heretical opinion, for which he was condemned, or a general abjuration, whereby he renounced all heretical opinions: *vide Lindwood de Hæreticis, cap. Reverendissimæ verb. nisi resipiscant & abjuraverint in forma ecclesiæ confueta: and this abjuration* [386] *might be required not only of those, that were detected*

(*) See also *Lindwœca de hæreticis, cap. item quia v. r. b. ordinarii,* and

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and convicted of heresy, but even of those, that were *graviter suspecti*; and if they refused it, they proceeded to sentence them as convict: *Entr' de Hæreticis, cap. ad abolendam.*

2. A contumacious heretic was among them of two kinds: 1. Such as refused to appear before the ordinary, being accused of heresy, and thereupon were duly excommunicate and so continued excommunicate for one year, *tum velut hæreticus condemnetur*, and was thereupon delivered or left to the secular power, *de Hæreticis, cap. 7. cum contumacia in 6to, &c.* 2. Where the party accused of heresy was convict by testimony or his own confession, and refused to repent and abjure, such a one might thereupon be sentenced as an heretic, and delivered over to the secular power, but yet he had this favour or privilege, if even after such sentence he willingly repented and abjured, the ordinary ought to accept thereof, and not deliver him over to the secular power, but he was spared. *Lindwood de Hæreticis, cap. Reverendissimæ verb. resipiscant, & Entr' de Hæreticis, cap. ad abolend. verb. sponte recurrere*; but then the ordinary might detain him in prison: *vide accordant 1 Mar. Br. Heresy.*

3. A relapsed heretic: and herein they distinguish between *fled relapsus, & verè relapsus*: *Lindwood de Hæreticis cap. item quia, verb. relapso:* 1. The former is where a man is accused of heresy, and is under a great suspicion thereof, but not convicted, only the ordinary puts him to abjure, which accordingly he doth, and afterwards doth entertain, visit, or comfort heretics, such a person by the canon law may be sentenced as an heretic relapsed, and delivered over to the secular power, but yet the ordinary may, as before, detain him in prison without actual delivering of him over to the secular judge to be executed. *Lindwood ubi supra, & in 6to decretal. cap. 8. Accusat de hæreticis.* 2. *Verè relapsus* is, when a man being convicted of heresy, and abjuring again falls into heresy, if he be thereupon convicted and sentenced, there can be no suspension of the sentence by the ordinary, tho the party repent and conform, but he must be delivered over to the secular power, and the sentence ought to be given, and [387] is not by any means to be suspended from execution: *6to de Hæreticis, cap. 4.*

But this relapsing is of two kinds according to the quality of his abjuration: if the abjuration be general of all heresies, if he after fall into any heresy, either *that* whereof he was formerly accused and convicted, or any other, he is to be sentenced as a relapsed heretic; but if

If the abjuration be only special of *that heresy* whereof he is accused, then he is not to be sentenced, as a relapsed heretic, unless he after fall again into the same heresy, which he so specially abjured; but herein there is some difference among the doctors, for some think even after a special abjuration of one particular heresy, if he falls into another heresy, *tensetur relapsus*: *vide Extr. de Hæreticis, cap. Accusat. §. 2. Eum vero in 6to & Lindwood de hæreticis, cap.* Item quia *verbo simpliciter in glossa*: but the ordinary may put this out of question, for it seems by the canon law he may at his pleasure in cases of heresy require a general abjuration, *viz. de hæresi generaliter & simpliciter*.

III. Now as to the punishment itself of heresy, especially of those that are either *contumaces*, or *relapsi*: 1. By the civil law; it is true, that the conviction and sentencing of heretics is as well thereby, as by the canon law, left to the ecclesiastical judge, so that without a declaration or sentence of the ecclesiastical judge the civil jurisdiction cannot proceed to inflict any punishment. *Lindwood de hæreticis, cap. Reverendissimæ verb. confiscata in gloso* tho confiscation of goods of the heretic followed upon his conviction, *necessaria tamen est sententia declarativa judicis super ipsâ confiscatione, & hæc sententia fieri solummodo debet per judicem ecclesiasticum, & non per judicem sæcularem*: *vide in 6to de hæreticis, cap. secundum leges*.

But tho the decision and judicial sentence of heresy was belonging only to the ecclesiastical judge, yet the civil constitutions of emperors and princes did institute and enact several penalties, as consequential upon such sentence, such as were confiscation of goods, disinherition of heirs, and in some cases death, as we shall see hereafter: *quod vide in Codice, Lib. I. tit. 5. de hæreticis per totam*.

As to the penalty of death *ultimum supplicium*: it should [388] seem the antient imperial constitutions made a difference between heresies in relation to that punishment: it appears by the edict of *Theodosius Codice, cap. 4.* the *Manichees* and *Donatists* were punished with death, and possibly so were the *Nestorians*, *ibidem cap. 6.* and generally all heretics, that seduced the orthodox to re-baptization, *ibid. cap. 23.* many other heretics were under milder sentences, some were punished with exile, some with extirmination from the city, some with pecuniary mulcts, and some with confiscation, which, it seems, was the most usual punishment: but it seems that by the constitution of the emperor *Frederic*, (which yet is not

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extant) *Hodie indistinet illi, qui per judicem ecclesiasticum sunt damnati de hæresi, quales sunt pertinaces & relapsi, qui non petunt misericordiam ante sententiam, sunt damnandi ad mortem per sæculares potestates, & per eas debent comburi seu igne cremari. Lindwood de hæreticis, cap. Reverendissimæ verb. penas;* and from this constitution of *Frederic* the course of burning generally all heretics indistinctly, if pertinacious or relapsed, took its rise.

Now as to the penalties by the canon law, it is true they go no farther than ecclesiastical censures, injunction of penance, excommunication, and deprivation of ecclesiastical benefices: but yet they made bold by some of their constitutions to proceed farther, and indeed farther than they had authority; such were among others imprisonment by the ordinary, and confiscation of goods (*c.*), but whether they adventured hereupon only in subservience to civil constitutions, or whether by their own pretended power, may be doubtful; but howsoever, it is so decreed in their canons and constitutions: *Vide Lindwood de hæreticis, cap. Reverendissimæ verb. confiscata, & ibidem Item quia verb sententialiter.*

But indeed as to the inflicting of death upon heretics, their canons go not so far as that; neither indeed need they, for emperors and princes being induced by them to enact such severe constitutions

[389] they did in effect the business by sentencing the heretic, and then leaving him to the secular power, so that the secular power was only in nature of their executioner; and altho they direct in some cases of treason an intercession to be made to the secular power to spare the life of the offender thus committed over to the secular power, *Extr. de verborum significatione cap. Novimus*, yet we find no such curtesy for heretics, but the princes, that do not effectually proceed according to the utmost of their power to eradicate them, are threatned with excommunication, and accordingly they are required to take an oath to perform it, *Extr. de hæreticis, cap. Ad abolendam.* (*)

Therefore as to the punishment of heretics with death, of an heretic so declared by the bishop, it was left to the secular power with this difference, if the person convicted were a layman, he was immediately after his sentence to be delivered to the secular power to be

(c) For in England before the statute of 2 H. 5. cap. 7. neither lands nor goods were forfeited by a conviction for heresy.

3 Co. Infilt. 43.

(*) *Vide Confir. Frederici, §. 6:*

burnt;

burnt ; but if he were a clergyman within the greater or lesser orders, he was first solemnly degraded, beginning with the chiefest order he had, as that of priesthood, and so to the lowest, *damnati per ecclesiam judici seculari relinquuntur animadversione debita puniendi, clericis a suis ordinibus primo degradatis. Extr. de hereticis, cap. ex-communicamus*; (+) the solemnity whereof see at large in 6to *decretal. de paenit. cap. Degradatio, Fox's acts and monuments part 1. p. 674.* the degradation of *William Sawtre.*

This degradation by the latter canons might be by one bishop, tho formerly it required more.

When the sentence was given by the ordinary, and the offender thus left to the secular power, he was delivered over to the lay-officer, and then a mandate or writ issued from the chief magistrate to execute the offender according to the secular law ; but of this more particularly hereafter.

I have been the longer in these particulars, that we thereby may observe these two things : 1. How miserable the servitude of christians was under the papal hierarchy, who used so arbitrary and unlimited a power to determine what they pleased to be heresy, and then *omni appellatione postposita* subjecting men's lives to their sentence. (*) 2. How finely they made the secular power their [390] vassals in execution of this odious piece of drudgery, as it was managed and practised by them.

I come now to a closer consideration of heresy, and its punishment according to the usage received in *England*, and the laws relating thereto, according to the method above propounded.

I. Therefore how the usage and law obtained concerning this matter in *England* before the time of *Richard II.*

As the romish religion was generally received here in *England* in this period, so the manner of proceeding touching heresy was much according to the papal decretals and constitutions, whereof a large account is above given.

The jurisdiction, wherein heresy was proceeded against, was at the common law of two kinds : 1. The convocation or a provincial

(+) *Vide Lindwood de hereticis, cap. Finaliter verb. sententie.*

(*) *Godefridus Coloniensis anno 1214.* speaking of the severity of the pope and the emperor *Frederic*, (the author of the constitution afore-mentioned for burning

heretics) says, *Eodem die, quo quis accusatus est seu iu/lo, seu inju/lo, nullius appellationis, nullius defensionis refugio proficit, demandatur, & flammis crudeliter injicitur.* See also *Mas. Paris, p. 429.*

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synod. 2. The diocesan or Bishop of the diocese, where the heresy was published, and the heretic refuted.

1. As to the former it is without question, that in a convocation of the clergy or provincial synod they might and frequently did here in *England* proceed to the sentencing of heretics, and when convicted, left them to the secular power, whereupon the writ of *Hæretico comburendo* might issue, (thus it was done in the case of the apostate *Jew*, *Braſt de Coronæ*, Lib. III. (d), and in the case of *Sautre* (e), 2 H. 4. who was convict in the convocation of *London*;) and then the archbishop, who was *præses concilii*, pronounced the sentence, degraded the offender, if in orders, and signified the conviction into chancery, whereupon the writ *de hæretico comburendo* issued.

2. As to the power of the bishop or diocesan alone there hath been diversity of opinions; some have thought, that the bishop of the [391] diocese might proceed against heresy by ecclesiastical censures, but as to the loss of life the conviction ought to be at least in a provincial council, without which the heretic ought not to undergo death by the writ *de hæretico comburendo*. 1. For that in the case mentioned by *Braſton*, Lib. III. *de Coronæ* the conviction of that heresy, or rather apostacy, whereupon the offender was burnt, was in the provincial council at *Oxford*. 2. The writ *de hæretico comburendo* in the register, and *F. N. B.* recites the conviction to be in a provincial council, and according to it is the opinion of *Fitzherbert*, *ibidem* fol. 269. and the statute of 2 H. 4. (hereafter mentioned) giving power to the ordinary finally to sentence an heretic, so that death should ensue thereupon, was *nova jurisdictionis in hac parte introductæ*. Again my lord *Coke*, 12 Rep. p. 56, 57. recites this to be the opinion of all the judges in 2 Mar. and in effect agreed unto 43 Eliz. by Sir John *Popham*, and others, 5 Rep. *Cawdrie's case*, p. 23. a. accordant, and *Brooke* seems to accord. 1 Mar. Br. *Heret.*

On the other side others have holden, that the diocesan alone by the canon law might convict of heresy, and that thereupon this writ may be issued: 1. This is consonant to the old decretals, and likewise to the provincial constitutions of *Arundel*, *Courtenay* and others; that the diocesan alone without the assistance of a provincial council might convict of heresy, and deliver over the offender to the secular power. 2. Again, the statute of 2 H. 4. cap. 15. recites and admits

(d) Lib. III. cap. 9. fol. 124. a. *Act. and Mon. Vol. I. p. 886. Rymer's Fœd.*
(e) *State Tr. Vol. VI. Append. p. 2. Fox's Vol. VIII. p. 178.*

the power of the diocesan in this case, but that by reason of the offender's going from diocese to diocese, and refusing to appear before the ordinary, he was interrupted in his proceeding, and thereupon the statute gives farther remedy. 3 That accordingly it was practised in the time of queen *Elizabeth*, when all former statutes concerning heresy were repealed, and the case stood as it was at common law. 4. That it was accordingly resolved by *Fleming, Tanfield, Williams and Crake* in *2 Jac. (f)*, when *Legate* was burnt for heresy; and accordingly my lord *Coke P. C. cap. 5. p. 40.* seems to be of [392] the same opinion (*g*), and so seems to retract what he had before delivered in his 12th report.

This business will be farther considered in the sequel of this chapter, for the present I shall only say thus much.

1. That the diocesan, as to ecclesiastical censures, may doubtless proceed to sentence heresy.

2. I think that at common law, and so at this day, (all former statutes being now repealed by *1 Eliz. cap. 1.*) if the diocesan convicts a man of heresy, and either upon his refusal to abjure, or upon a relapse, decrees him to be delivered over to the secular power, and this be signified under the seal of the ordinary into the chancery, the king might thereupon by special warrant command a writ *de hæretico comburendo* (*h*) to issue, tho this were a matter that lay in his discretion to grant, suspend, or refuse, as the case might be circumstantiated.

And what is here said of the diocesan or bishop of the diocese is true also of the guardian of the spiritualities *sede vacante*, but 'till the statute of *2 H. 4.* the vicar general, commissary, or official of the diocesan had no cognizance, unless by special commission as an inquisitor from the pope; and *Lindwood* gives the reason *de hæreticis cap.* Item quia turpis verb. ordinarii in gloriâ, *Est enim causa hæresis una de*

(f) 12 Co. Rep. 92.

(g) Lord *Coke* does not intimate as if he was of this opinion, or had retracted what he had (said in his 12th report, and had been solemnly resolved in *Cowdray's case*); he says indeed, that from the statute of *2 H. 4.* may be gathered this conclusion, that the diocesan hath jurisdiction of heresy, and accordingly it was resolved in *Legate's case*, and that upon a conviction before the ordinary of heresy, the writ *de hæretico comburendo* doth lie; this he mentions as also resolved in *Legate's case*, as in truth it was; but to this last resolution he doth not declare any assent, for it is the fact only,

which he says may be gathered from the act of *2 H. 4.*

(h) Whether this writ lay at common law, or was introduced by the clergy about the time of *Henry IV.* hath been made matter of question: see *Saint Tr. Vol. II. p. [175]* if the common law gave such a writ; it will be difficult to reconcile it with what our author says a little below, that the usual penalty was confiscation and banishment, and that *5 R. 2* was the first temporal law against heresy, which yet went not so high as death, but only to imprisonment and ecclesiastical censure.

majoribus causis, quæ pertinent ad solos episcopos; but the statutes of 2 H. 4. cap. 15. 2 H. 5. cap. 7. while they were in force, gave the cognizance of heresy, as well to the bishop's commissary, as the bishop.

[393] 3. But yet I never find before the time of *Richard II.* that any man was put to death upon a bare conviction of heresy, tho after a relapse, unless he were sentenced in a provincial council: and the reason seems to me to be this, when the offender was convicted of heresy either thro pertinacity, or after a relapse, and so deliver'd over to the secular power, the ecclesiastical judge had done his busines, and the rest that follows was to be the act of the temporal or civil power, who were never obliged nor thought themselves obliged here in *England* to take away the life of a person upon so slender an account, as the judgment of a single bishop (*i.*), nor indeed, unless it were a sentence by the weighty body of a provincial council: *vide Bracton, ubi supra.*

For as this kingdom was never obliged by the canons or decretals of popes or of provincial councils, further, than they were admitted, so neither were they bound by the imperial constitutions of the emperor *Frederic* or others, who by their edicts inflict death upon all persons censured by the diocesan to be relapsed or contumacious heretics; but herein they did as the laws and usages of the kingdom, and their own prudence, and the circumstances of the case required or directed.

But yet I take it, that the conviction before the diocesan alone was a good conviction, and the party might thereupon be left to the secular power, and so burnt by a writ *de hæretico comburendo*, if the king and his council thought fit, tho *de facto* it was not at all, or at least not usually so done, till the time of *Henry IV.* unless the conviction and sentence were in a provincial council, for the reason before given.

Fitzherbert therefore was herein mistaken, and also when he saith, it was to issue only in case of relapse; for a relapse could not be without conviction, and if the party were thereby convicted of the heresy, whereof he was accused, and persisted in it till after sentence, and refused to abjure, such a *contumax* or *pertinax hæreticus* might be proceeded against as a relapsed heretic, and a writ *de hæretico comburendo* might thereupon issue, as it seems, for the writ in the register

being formed upon a relapsed heretic pursues the case as it finds it, but is not exclusive of the other case of a contumacious heretic, that persists therein before and after the sentence; *de quo vide supra*; *vide accordant 1 Mar. Br. Heresy 1.* and *25 H. 8. cap. 14.*

Touching the penalty of convicts of heresy here in *England*, I find very rarely death inflicted; before the reign of *Richard II.* the usual penalty was confiscation, and seizure of goods; *quod vide Clas. 20. H. 3. m. 11. dorf.* touching *Ermald de Peregard*, who was convict of heresy, and his goods seized to the king's use; the like, *Clas. 26 H. 3. m. 15. pro Stephano Peliter*, and as to corporal punishment of such convicts, it was usually in antient time banishment and stigmatizing, as appears by *Ralph de Diceto, sub anno 1166.* in the time of *Henry II.* and *Brompton H. 2. sub anno 1159.* (*), but their conviction was in a provincial council held at *Oxon præsente rege, & præsentibus episcopis.*

But *quo jure* the forfeiture of goods was then practised, is considerable: *vide Co. P. C. cap. 5.* the forfeiture of goods was introduced by *2 H. 5.* and that statute being repealed, ceaseth.

And in the first temporal law, or pretended law (†) made against such offenders, *viz. 5 R. 2. cap. 5.* where, upon certificate by the prelates into the chancery, commissions shall issue to the sheriffs to apprehend and imprison the offender, it is only until they will justify themselves according to the law and reason of holy church, so that it seems the punishment did not hitherto *de facto* exceed imprisonment and ecclesiastical censures; and yet it seems that *Swinderby* and others in the time of *Richard II.* before the statute of *2 H. 4.* were ordered to be executed for heresy: *vide Fox part 1. p. 580, 618.* but none by name appear to be executed, *ibidem p. 659.* but of this hereafter. (†)

As touching the writ *de haeretico comburendo* it was no writ of course, nor issued by the chancellor, but by special warrant from the king upon the certificate of the conviction and sentence made to the king under the seal of the archbishop, if it were in a provincial council.

(*) See also *Mat. Paris*, p. 105.

(†) Our author here calls it a *pretended law*, and lord *Coke* calls it a *supposed act*, because the commons never consented to it, for which reason in the next session of parliament it was annulled, altho by the prelates means it hath been continually printed, and the act, which annulled the same, hath been from time to time kept from the print. *2 Co. Rep. p. 57.*

(†) It does not appear, that any were ordered to be executed for heresy in this reign, and as to *Swinderby*, Mr. *Fox* says, he was declared an heretic, but suffered no great harm during the life of king *Richard II.* and if he was burnt, it was not till after the statute of *2 H. 4.* See *Fox's Acts and Mon.* p. 620.

And thus far what I find concerning heresy at common law before the time of *Richard II.*

II. As to the times of *Richard II.* *Henry IV.* *Henry V.* and so to *25 Henry VIII.*

The first temporal law, or pretended law against heretics in this kingdom, was *5 R. 2. cap. 5.* which did not go so high as death, but only to imprisonment and ecclesiastical censure, as appears by the printed statute; but this was in truth no act of parliament, for the commons never assented; and accordingly *Rot. Parl. 6 R. 2. n. 52.* the same is declared by the king and parliament, which it is true, was never printed among the statutes, but is at large recited by Mr. *Fox, part 1. p. 576.* and therefore we find no other punishment during this king's time, but imprisonment and ecclesiastical censures.

But in the time of *Henry IV.* the power of the diocesan was enlarged, *viz.* by the statute of *2 H. 4. cap. 15.* (*l*) *viz.* the diocesan hath power given him to arrest and imprison persons suspect of heresy, till purgation or abjuration, and hath also power to fine and imprison persons for those offenses, and estreat the fines; and if a person be convict of heresy before the diocesan and his commissaries, and do refuse to abjure, or having abjured fall into relapse, so that according to the canons he ought to be left to the secular court, whereupon credence shall be given to the diocesan or his commissaries, then the sheriff of the same county shall be personally present at the preferring of the same sentence, when required by the diocesan, and shall receive the person sentenced, and cause him before the people in an high place to be burnt.

[396] This statute gave in effect the whole power to the diocesan, and upon this account *William Sawtre (m)* after sentence and degradation in the provincial synod of *London* was burnt in the beginning of *Henry IV.*'s usurpation; the whole process and history of whereof is delivered by Mr. *Fox* in his acts and monuments, *part 1. p. 674, 675.* and yet it is observable, this was not done barely by the order of the diocesan (*n*), but a special writ *de haeretico comburendo*

(*l*) This statute was afterwards repeal'd by *25 H. 8. cap. 14.*

(*m*) He was a parish-priest, first of St. *Margaret of Lynn* in the county of *Norfolk*, and afterwards of St. *Sybil's* church in *Spirke-lane, London,* and was the first, who appears to have been executed for formal heresy in *England.*

(*n*) Nor could it be so done, because he was not sentenced by virtue of the act of *H. 4.* which extended only to convictions before the diocesan or his commissary, whereas *Sawtre* was convicted before the convocation; and even on a conviction before the diocesan the sheriff had no power to burn the party convict without a writ, unless

brevendo issued to the mayor and sheriffs of *London* to perform the same, which writ is there mentioned *verbatim*, and is the very same, which is recited by *F. N. B.* fol. 269. and was the warrant for the burning of *William Sawtre*.

Now touching this matter we are to observe, that the parliament of 2 *H. 4.* began the 20th day of *January in octabis Hilarii*, it continued till the 10th of *March* following, *William Sawtre*, having the year before been convicted for heresy before the bishop of *Norwich*, was upon the 22d and 24th of *Febr. 2 H. 4.* (which was sitting the parliament) in the provincial council held in *St. Paul's, London*, convicted and sentenced, as a relapsed heretic, and an heretic to be punished; this was done in the provincial council before *Thomas Arundel*, archbishop of *Canterbury*, as appears by the acts of the registry of *Canterbury* collected by *Mr. Fox*, part 1. p. 673, 674, 675. upon the 26th of *Febr.* 2 *H. 4.* per ipsum regem & consilium in parlamento, and is entered *verbatim* in the parliament-roll 2 *H. 4.* n. 29. and is the very same with that in *Fitzh. N. B.* before-men-[397]tioned, and agrees *verbatim* with it; and upon this writ *Sawtre* was burnt, being first solemnly degraded.

This conviction, sentence, and writ, tho after the commencement of the parliament, was before the end of that parliament, and consequently before the statute of 2 *H. 4. cap. 15.* passed, which passed not till the last day of the parliament, viz. 10 *Martii*; so that at that time the offender could not be executed but by writ *de haeretico comburendo*, for the diocesan had not power by his own immediate warrant to command execution, till that passed, which passed not, till after the definitive sentence.

In this parliament there was a petition of the clergy against heretics, which was the foundation of the statute of 2 *H. 4. cap. 15.* and was granted by the king *de consensu magnatū & aliorum procerū regni in præsenti parlimamento existentium*, with some additional clauses, which were also drawn up into the act of 2 *H. 4. cap. 15.* but in that answer no consent of the commons appears, and yet the act was

unless he was present at the pronouncing the sentence, see *State Tr. Vol. VI. Appendix*, p. 1. besides, as our author observes below, this act did not pass till after *Sawtre* was sentenced, so that how it can be said, that it was upon account of this act that *Sawtre*

was burnt, I know not, except it be with regard to the encouragement the clergy might take from the prospect of its passing for anticipating the exercise of such a cruel (tho to them desirable) power.

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drawn up, and proclaimed, and, as it is now printed, is recited to be at the petition of the prelates, clergy and commons of the realm in parliament, and the enacting clause is by the king by the assent of the states and other discreet men of the realm being in the said parliament: this is observed by Mr. Fox in his *Acts and Monuments, part 1. p. 773.* whereupon he concludes, that this was no act of parliament, but an act of the king and clergy like that of 5 R. 2. before-mentioned, which was declared void, because the commons never assented, as is before observed.

But the truth is, the commons did assent to this act, tho their assent be not expressed in the parliament-roll as it is entered, as appears in the speech of the speaker of the commons to the king the last day of the parliament, *Rot. Parl. 2 H. 4. n. 47.* where they thank the king for the remedy he had ordained in destruction of the heretical doctrine of the sects; and besides in the same parliament-roll, n. 81. " Inter " petitiones communitatis, Item prient les communes, qe quant, af-
 [398] " cun home ou feme, de qel estate ou condition qil soit, soit
 " pris & imprisone per *Lollardie*, qe maintenant soit mesm
 " en respons, et eit tiel judgement, come il ad deservy en example
 " dautres de tiel male sect per ligierment cesser lour malveys predica-
 " tions, & lour tenir al a foy christian. Ro'. le Roy le voet.

It is true this was never drawn up into a distinct act, for the provision by the statute of 2 H. 4. cap. 15. had a full and effectual provision for it; but this petition of the commons with the king's assent was the principal basis, upon which the statute of 2 H. 4. cap. 15. was built, and the statute was drawn up upon both petitions, as well that of the commons, as that of the clergy both put together, as was usual in those times, and so warrants the recital of the preamble of the printed statute of 2 H. 4. of the petition both of the clergy and commons (*), and every man knows, that in the time of *Henry IV.* and afterwards the professors of the christian religion, (that yet for the same was sentenced as heretics,) came under the reproachful title of *Lollards.*

This act of 2 H. 4. doth not determine what is heresy or what not, but leaves it to the decision of the diocesan, which wild and unbounded jurisdiction they had and used, till 25 H. 8. this therefore was their

(*) This petition of the commons amounts to no more, than that the *Lollards* should be caid to an account and punished according to their deserts, but contains

nothing in it, which can be a warrant for such severe penalties, as are provided by that act, there proceeded from the petition of the clergy.

power

power at common law, and the temporal judge or power was to give credence herein to their sentence, but yet the consequence thereof being but to be left to the secular power, the secular power might exercise his own discretion, and grant a writ *de hæretico comburendo*, if he were satisfied of the justice of the sentence, or forbear the granting it, if he were not satisfied, that the thing charged was a real heresy, or that the ecclesiastical judge had proceeded fairly in the case. (†)

But there were some points of power introduced by this act, and given to the diocesan, which he had not at the common law, *viz.* [399]

1. Power to arrest and imprison persons suspect of heresy, for altho the pope's decretals had before this pretended to give power of imprisonment to the diocesan, *Extr. de pænis, cap. 3. in. 6to*, yet that power never obtaind in *England*, till this act of 2 H. 4.

2. Power to set and estreat fines upon the offender.

3. Power to deliver over immediately to the temporal officer a relapsed or contumacious heretic to be burnt without expecting the king's writ *de hæretico comburendo*, with this notable advantageous clause *whereupon credence shall be given to the diocesan or his commissary*.

And accordingly the bishops after this act put the same in ure by their own immediate warrant or order delivering the party to the sheriff to be executed; but yet the conclusion of their sentence ran most commonly as formerly, *viz.* appointing him to be left to the secular power, and so leaves him, but sometimes, as in the definitive sentence against the lord Cobham, *Fox, part 1. p. 734.* committing him from henceforth to the secular power, and judgment to do him thereupon to death.

Now it is true, that upon the sentence of the diocesan the sheriff or officer, or any other were not to dispute, whether the same were truly heresy or not. 1. Because it was an act within their cognizance and jurisdiction. 2. Because it is by 2 H. 4. enacted, that credence herein shall be given to the diocesan or his commissary.

But yet as to the first point of the statute, the imprisoning of persons suspect of heresy, the temporal judge had cognizance and power to determine, whether that for which the party was imprisoned by

(†) But by the papal constitutions this liberty is not allowed to the secular power, for by those constitutions it is provided, That the punishment of heretics must not be relaxed or delayed. *Confit. Innoc. IV. cap. 24. and 32. Clem. IV. Confit. XIII.* and "That all magistrates under

" the penalty of excommunication must execute the penalties by the inquisitors " imposed on heretics without reviling the " justice of them, for heresy is a crime " merely ecclesiastical." *Confit. X. Bull. Rom. Tom. I. p. 453.*

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the diocesan were heresy or not; and if it appeared to the temporal judge not to be heresy, tho the diocesan had certified it to be heresy, the temporal judge might deliver the party imprisoned upon an *Habeas Corpus*, as was done M. 5 E. 4. Rot. 143. B. R. in Keyser's case (o).

[400] and the party detaining him is punishable in an action of false imprisonment, as was done in Warner's case (p), M. 11 H. 7. Rot. 327. both which cases are at large reported, Co. P. C. cap. 5. p. 42. and therefore in cases of such return upon an *Habeas Corpus*, or justification by this act in false imprisonment, the particular heresy must be set forth, what it is, that the temporal judge may judge, whether it be heresy or no.

By this statute it appears, 1. That the diocesan might convict of heresy, and thereupon the party convict be left to the secular power, which settles the doubt raised by Fitzh. N. B. 269. 2. That he might convict an heretic, so as to subject him to the punishment of death not only in case of relapse after abjuration, but also in case of refusal to abjure. 3. The power of convicting an heretic is not limited to the diocesan only, but also to his commissary in order to his execution by the secular power.

After this ensued the statute of 2 H. 5. cap. 7. against heretics and *Lollards*, and thereby it is enacted.

1. "That all temporal officers be sworn to destroy all heresies and errors, commonly called *Lollardy*, and that they be assisting to the ordinary, when required, at the ordinary's charge.

2. "That when persons are convict of heresy, and left to the secular power by the ordinaries or their commissaries, their lands in fee-simple shall after their death be forfeit to the king or lords, of whom they are held, others than the ordinaries and commissaries themselves, and all their goods.

3. "That the justices of the king's bench, of the peace, and assize, shall have power to inquire of such errors and heresies called *Lollardy*, and their abettors, &c. and make out process of *Capias* against them.

4. "That such *Lollards* and their indictments be delivered [401] over by indenture to the ordinaries or their commissaries, who thereupon are to proceed to their acquittal or conviction, but

(o) Keyser's heresy was, that being excommunicated by the archbishop of Canterbury; he said, *that notwithstanding that, he was not excommunicated before God, for his corn yielded as well, as any of his neighbours,*

10 H. 7. 17.

(p) Warner's heresy was, that he said *he was not bound to pay tithes to the curate of the parish, where he dwelt,* & Rot. Rep. 110, 3 Ge. 1. 42.

" the

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" the indictment to be only as an information, not as evidence against
" the offender, but the ordinaries to commence their process against
" them, as if there were no indictment.

5. " Punishment for escapes is by forfeiture of goods and seizure
" of lands till he returns ;" and some other provisions.

This is the first law, that gave forfeiture of lands in fee-simple of
an heretic convict, and executed, and the first law, that settled the
forfeiture of their goods, tho forfeiture of goods were *de facto* used
before. (q).

Tho in some respects it enlarged the ordinary's power, yet it may
seem some kind of curb upon them to have an indictment previous,
yet I find them not restrained from proceeding, tho there were no
such previous indictment.

Hitherto there was no limitation or restraint, what should be or
what should not be heresy, whereupon death might be inflicted, but
the ordinary's power was left arbitrary and unlimited therein.

By the statute of 25 H. 8. cap. 14. there was a great alteration
made as to the point of heresy.

1. The ordinaries were not to proceed against any for heresy without
presentment or indictment thereof before the king's justices, or
an accusation by two lawful witnesses at the least, and that before any
citation or process by the ordinary.

2. That persons convict by the ordinary of heresy, and refusing
to abjure, or having abjured relapsing, shall be burnt by the king's
writ *de haeretico comburendo* first had and obtained for the same.

3. Tho it do not positively limit what only shall be heresy, yet it
enacts what shall not be accounted heresy. 1. Speaking against the
authority of the pope. 2. Speaking against spiritual laws made by
the authority of the see of Rome repugnant to the laws of this realm,
or the king's prerogative, and indeed it was time to make this pro-
vision, the papal authority being now in a great measure [402]
taken away by act of parliament.

4. Persons accused of heresy shall and may be letten to bail either
by the ordinary, or in their default by two justices of the peace.

IV. By the statute of 31 H. 8. cap. 14. a farther alteration was
made touching heresy.

1. Six articles are declared and enacted, 1. That in the sacrament
of the altar after consecration there remains no substance of bread
and wine, but the substance of Christ.

(q) Co. P. C. 43

2. That,



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2. That communion in both kinds is not necessary *ad salutem*.
3. That priests may not marry by the law of God. 4. That vows of chastity ought to be kept by the law of God. 5. That private mass is necessary to be continued. 6. That auricular confession is necessary to be retained and used.
2. That to preach or to declare, or hold opinion against the first article touching transubstantiation shall be adjudged heresy, and the persons convict thereof, their aiders, &c. convicted thereof in the form underwritten shall be adjudged heretics, and suffer death by burning without any benefit of abjuration, sanctuary, or clergy, and shall forfeit his lands to the king, as in case of high treason.
3. That if any openly preach against the last five articles, and be thereof convict or attaint by the laws underwritten, every such offender shall suffer death as a felon without benefit of clergy or sanctuary.
4. That if any person publish or declare his opinion against the five articles last mentioned, he shall for the first offense forfeit his goods, the profits of his lands during his life, and ecclesiastical promotions, and be imprisoned at the king's will, and upon the second conviction shall suffer as a felon without benefit of clergy.
5. The king is empowered to issue commissions directed to the archbishop or bishop of the diocese, and the chancellor and others, or three of them, whereof the archbishop or bishop, or chancellor to be one, to take information by oath of twelve men, or the testimony of two lawful persons of all heresies, &c.
6. The ordinaries within their several jurisdictions to take [403] information of heresies, and justices of peace, &c. to take inquisitions touching heresies; these informations and inquisitions to be certified to the commissioners above-mentioned.
7. The commissioners or any three of them to make process against the offenders into all the shires of *England* and *Wales*, as in case of felony, and upon their appearance shall have full power and authority to hear and determine the said offenses according the laws of this realm and this statute.
8. Commissioners or two of them have power to bail persons, accused, till trial.
9. No challenge to be admitted but for malice or enmity, trial of foreign pleas by the commissioners, no escheates to the lords, with some other clauses.

This

This act, tho it doth not, in express-terms, repeal the statute of 2 H. 5. yet it doth in a great measure, alter it. 1. In point of jurisdiction; for, here the proceeding to judgment is to be by commissioners under the great seal, and not by the ordinary or ecclesiastical jurisdiction. 2. The offense of heresy now in a great measure is made a secular offense, especially in the five last articles which are made felony. 3. Tho the commissioners have power to proceed upon accusations, as well as indictment, yet the trial of the offender was to be by jury, and the words *hear* and *determine*, &c. import the same.

Thus the law stood until 1 E. 6. with some small variations in 34 & 35 H. 8. cap. 1. but by the statute of 1 E. 6. cap. 12. all the before-mentioned statutes, *viz.* 5 R. 2. 2 H. 4. 2 H. 5. 25 H. 8. 31 H. 8. 35 H. 8. and all other statutes made in the time of *Henry VIII.* concerning religion are repealed. (r)

By the statute of 1 & 2 P. & M. cap. 6. the statutes of 5 R. 2. 2 H. 4. and 2 H. 5. are revived; but the statutes in *Henry VIII.*'s time, repealed by 1 E. 6. stood still repealed, and thus [404] they continued till 1 Eliz. and if there had needed any further repeal of the statutes of 25 and 31 H. 8. besides what was done by 1 E. 6. yet the statute of 1 & 2 P. & M. cap. 8. *in fine* hath this clause, that was never repealed by the statute of 1 Eliz. nor any other statute since made, *viz.* "That the ecclesiastical jurisdiction of archbishops, bishops and ordinaries be in the same state for process of suits, punishments of crimes, and execution of censures of the church, with knowledge of causes belonging to the same, and as large in these points as the said jurisdiction was in the 20th year of *Henry VIII.*" which doubtless repealed all acts made between 20 H. 8. and 1 & 2 P. & M. in derogation or alteration of the ecclesiastical jurisdiction, or the styles or forms of their proceeding by *Henry VIII.* or *Edward VI.*

V. I come now to the time of queen *Elizabeth.*

By the act of 1 Eliz. cap. 1. there are these alterations: 1. The statutes of 1 & 2 P. & M. cap. 6. 5 R. 2. 2 H. 4. 2 H. 5. are re-

(r) So that the punishment of heresy then stood as it was at common law before any statute made against it, notwithstanding which there were some examples in this reign of persons burnt for heresy, *viz.* *Joan Bocher* and *George van Parre*, who were put to death much against the will of that

good king by the over-persuasion of archbishop *Crammer*, for which reason (as bishop *Burset* remarks) what that archbishop afterwards suffered in the succeeding reign was thought a just retaliation on him. *Burnet's Hist. of Reformation*, Vol. II. p. 212.

pealed,

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pealed, so that now the whole jurisdiction touching heresy stands as it did at common law, with such farther additions as are made by that statute of 1 Eliz. 2. The queen, her heirs and successors to have power to issue commissions under the great seal to exercise all jurisdictions spiritual and ecclesiastical within this kingdom, and to visit, reform, redress, order, correct, and amend all errors, heresies, schisms, &c. which by any spiritual or ecclesiastical power can or may be lawfully reformed. 3. That such commissioners shall not have power to determine any matter to be heresy, but only such as have been heretofore determined to be heresy: 1. By the authority of the canonical scriptures. 2. Or by any of the first four general councils, or any other general council, wherein the same was declared heresy by the express and plain words of the said canonical scriptures. 3. Or such as shall hereafter be determined heresy by parliament with the assent of the clergy in their convocation.

Upon this statute these things are observable:

1. By this statute the ancient common law was revived for the conviction of heretics, and delivering them over to the secular power,

[405] which might at common law be done either in a provincial council, or by the diocesan alone, and accordingly, it is said *Co. P. C. cap. 5.* (f) the conviction of heretics was practised in the queen's time, but I find no particular instance thereof in the queen's time (t), but in the case of *Legat*, 9 Jac. it was so resolved by four judges, and accordingly put in ure, and upon such a conviction before the diocesan a writ *de heretico comburendo* might and did issue in the cases of *Legat* and *Wightman* convict of *Arianism* before the diocesan and left to the secular power, who were accordingly burnt (u): *vide Baker's Chronicle*, p. 446.

2. There was another method of conviction of heresy, and thereupon delivering over to the secular power, and execution of the offender by writ *de heretico comburendo*, namely by sentence of the commissioners for ecclesiastical causes instituted by the statute of 1 Eliz. but this takes not away the conviction of heresy by the diocesan or in a provincial council, but these remain as they did at common

(f) p. 46.

(t) That is of a conviction in a provincial council, or before the diocesan alone, for of convictions before the commissioners some instances are here mentioned by our author.

(u) But yet ought not to have been so

by law, according to the opinion of lord Coke, for that the statute of 1 H. 4. cap. 15. which gave the writ *de heretico comburendo* was repealed, and at common law no such writ lay upon a conviction by the ordinary, 5 Co. Rep. 23. a. 12 Co. Rep. 56. 92.

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law, and thus it was done 17 Eliz. upon *John Peters* and *Henry Dirwert* (*x*), *Flemings*, convict of heresy before the commissioners for *Anabaptism*, and thereupon a writ *de hæretico comburendo* issued.

3. That this act restored the issuing of a writ *de hæretico comburendo* (*y*) according to the course of the common law against a man convict of heresy, and refusing to abjure, or having abjured relapsed, and thereupon delivered to the secular power.

And note, that this writ is no writ of course, nor can the chancellor or keeper issue this writ upon a *significavit* by the commissioners or diocesan without a special warrant, for that the king may see cause to suspend the issuing thereof, or wholly supersede it, or pardon the sentence, for it may so fall out, that the diocesan hath adjudged a thing to be heresy, or a party to be an heretic, [406] which in truth and reality is not so, or it may be the party may retract, and so be capable of mercy.

But the course was for the diocesan alone, if the conviction were singly before him, or for the diocesan with the consent of the commissioners, if the conviction were before them, by *significavit* under the seal of the diocesan to return the conviction into the chancery, and then the same is brought before the king and his council, and after deliberation by the king with his council, a special warrant issues from the king by the advice of his council, to the chancellor or keeper, together with the tenor of the writ *de hæretico comburendo* expressed in the warrant, and commanding the chancellor or keeper to issue it under the great seal, which warrant is filed for the keeper's indemnity: this was the form which was used 17 Eliz. in the case of the *Anabaptists* above-named; and note, altho the conviction were before the commissioners, yet the diocesan was one of the commissioners, and his seal to the *significavit*, so that there were the junc-tures of both authorities, viz. the authority of the diocesan according to the course of the common law, and of the commissioners according to the power given by the statute of 1 Eliz. and we have reason to believe, that the subsequent convictions in the queen's time pursued this form, and possibly that of *Legat's* in 9 Jac. might be in the same nature, tho the resolution of the judges, upon which it seems the process was formed, takes notice only of the diocesan.

(*x*) Their names were *John Wickmacher* one way or other, but on'y repeals the several statutes relating to heresy, and so and *Hendrick Ter Wort*.

(*y*) The act says nothing about this writ leaves the matter, as it was at common law.

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4. That the forfeiture of goods or lands by conviction of heresy is by this act repealed.

5. Here is the first boundary, that was set to the extent of heresy as to the matter thereof, what only shall be adjudged heresy (z); and altho this clause refers expressly only to the commissioners, yet it is to be the measure and rule for diocesans, and the convictions in their proceedings against heretics.

[407] But it is true, it is not so particular and certain, as might have been wished, for according to the inclination of the judge possibly some would determine that to be heresy by the canonical scriptures, which possibly is not at all heresy, nor contrary to the canonical scriptures but howsoever it brought heresy to a greater certainty than before.

Upon this statute of 1 Eliz. these things seem to me to be true: 1. That the *significavit* of the conviction of heresy ought to contain, even at common law, the particular heresy, whereof the party was convict, and without such particular *significavit* no writ *de hæretico comburendo* ought to issue; and the reasons are, 1. Because it concerns the highest temporal interest that any man can have, namely his life, and for this reason even in smaller temporal concerns a general cause or return of heresy or criminousness is not sufficient, it is not a sufficient cause of refusal or non-admission of a clerk to allege, that he is *criminosus & non idonens*, or that he is *schismaticus inveteratus* 5 Co. Rep. 58 a Specor's case, and the reason is very well given, *coment que nappent al court la rogne a determiner schismes ou heresies, uncore l'original cause del fait estant matter, dont le court le roy ad conusance, le cause del schisme ou heresie, purque le presentee est refuse, covient estre alledge en certain al entent le court le roy poit confule ove divines a scaver, si ceo soit schisme ou nemy;* and upon the same reason it is, that in Keyser's case upon an *Habeas Corpus*, and Warner's case upon a false imprisonment, that altho the statute of 2 H. 4. enable the ordinary to arrest for heresy, it is not a sufficient return or justification to say the party was an heretic, or suspect of heresy, but he must return the particular heresy, for which he was so arrested, that the court may judge upon it; and tho the temporal court hath no

(z) And great cause there was for this limitation, as appears from the fore-mentioned cases of Keyser and Warner, and others, 12 Co. Rep. 58. altho, as our author sayeth, there still is too great a latitude

left, since it is unavoidable, but different interpretations will in many cases be put even upon scripture, so long as the use of reason and liberty of thought continues.

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original cognizance of heresy, yet it being incident to a temporal interest, namely the liberty of a man's person, the temporal court shall judge, whether it be heresy or no (*); and accordingly in those cases they did adjudge that to be no heresy, which the bishop returned as an heresy, and in one case the prisoner was [408] discharged, and in the other case recovered by an action of false imprisonment. *Co. P. C. cap. 5. 2.* Altho heresy be a case of ecclesiastical cognizance and jurisdiction, and as long as it only concerns ecclesiastical censures, and (so far forth only) faith is to be given to them, 'till reversed by appeal, yea altho it should in the sentence itself most evidently appear, that it was not heresy, yet as to the inflicting of death at common law they had no power, but all they could do was to commit him to the secular power, their busines was then at an end; but now begins the concern of the secular power, and herein they were not, as lacqueys, only to follow what the ecclesiastical judge had done, for now the life of a subject was concerned either to be taken away or not, and that merely by the secular power, and herein the secular power had a judgment of discretion of their own, which they are to exercise, but yet cannot do it, unless the special matter of the heresy be certified to them.

2. Admit a general certificate without shewing the particular cause of heresy were good at common law, yet since the statute of 1. Eliz. it must be particular, because an act of parliament, which belongs to the interpretation of the common law, directs what shall be heresy and what not, and the king and his council are to give the warrant for issuing the writ, and therefore must be ascertained, whether it be an heresy within the description of this act, and the chancellor or keeper of the great seal is to affix the seal and issue the writ, and therefore ought to be satisfied by the *significavit*, that it is an heresy within that act, and if he be not, he is not to seal it, for it concerns the life

(*) This is certainly agreeable to the law of the land, 2 Co. Inst. 615, 623. altho it be what the clergy have always disallowed, who never liked to submit their proceedings to the judgment of the king's courts, or of any authority but what was ecclesiastical, accordingly we find a decree of Boniface V. "Whereby all powers, lords temporal, and rectors with their officers are forbid to judge or take cognizance of heresy, it being merely ecclesiastical, or to refuse to execute the punishments enjoined by them, or any way directly or indirectly to hinder their process or

sentence under the pain of excommunication, which if they obstinately lie under for a year, they are to be condemned as heretics;" *Sext. decretal. l. 5 tit. 2. cap. Inquisitoris negotium*: this decree is confirmed by the general council of Constance, sess. 45. See the constitutions of archbishop Boniface, *cap. de impenitentiis prohibitiones, &c. cap. de malitia judicis secularis, &c. & cap. de pena impudentiorum, &c.* See also archbishop Bancroft's objections, 2 Co. Inst. 601, 609, &c. *Index Leg. Ecclesiast. Angl. p. 1066. Pref. to Codex, p. 19.*

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of a subject; these are not bare ministerial acts by the king and his council or chancellor in subservience to the ecclesiastical jurisdiction, but they are acts judicial, where they are to exercise both a legal and well warranted discretionary judgment, and therefore must have the cause before them upon the *significavit*, and not by a bare general story of a conviction of heresy, and therefore if upon the return of the *significavit*, whereby the party is convict and sentenced either as an obstinate or relapsed heretic, it shall, by the particularity of the return, appear, that it is not heresy, there ought no warrant to be granted for the issuing of the writ, and if granted, yet the writ ought not to be sealed, and therefore the certificate or *significavit* must be special and certain. (*)

Again, this definition or circumscription of heresy is by an act of parliament, and tho the matter of it, *viz. Heresy*, be of ecclesiastical cognizance, yet the interpretation of the act of parliament is of a temporal cognizance, especially where a temporal interest, and the greatest temporal interest in the world, namely life, is concerned: we have many acts of parliament, that concern matters of ecclesiastical cognizance, as touching clergy and purgation, touching matrimony and the prohibited degrees, yet when these acts of parliament come to be expounded, the temporal judge hath the cognizance of them.

The statute of 2 H. 4. hath two notable clauses, one whereby the ordinary hath power to arrest for heresy, there is in that clause no express provision, that credence shall be given to the ordinary and therefore if he arrest for that, which is not heresy, the arrest is unlawful, and as an incident to an interest at common law, *viz.* the liberty of the subject, the temporal court hath power to determine, whether it be heresy or not, as is above-shewn: the other clause is a power-committed to the ordinary to deliver over the party convict to the sheriff to be executed without any writ *de heretico comburendo*. This was introductory of a new law, and therefore the sheriff or [410] officer might possibly scruple not only whether there were such a sentence (*a*), but whether the thing, for which the

(*) The same reasoning holds in granting the writ *de excommunicato capiendo*, for that, afflicting the liberty of a man's person, concerns a temporal interest.

(a) There could be no room for this scruple, because, unless the sheriff was pre-

fent at pronouncing the sentence, the ordinary had no power by 2 H. 4. to deliver the heretic to the sheriff, nor could the sheriff proceed to execute him without a writ.

party was condemned as an heretic, were really heresy; but to avoid all difficulties of this kind this unusual clause is added, *that herein credence shall be given to the diocesan or his commissary.*

We are here in the case of an act of parliament, an act that introduceth a new circumscription of heresy, an act that concerns the life of the subject, in a business, which after the ordinary hath passed his sentence, is now wholly left to the king, who, tho he be supreme in matters ecclesiastical as well as temporal, yet in the issuing of his writ *de hæretico comburendo* is looked upon by the ecclesiastical judge, as acting by his secular power, for that is the conclusion of the sentence, *viz. that he be left to the secular power*, in this he acts not ministerially but judicially, and therefore upon all accounts must have a certain return of the cause of the heresy, and if it shall appear to him, or to the chancellor, that is to seal the writ, that the return contains not any certainty of the heresy, or that which is returned as an heresy, be not such as is described by the statute of 1 Eliz. no writ *de hæretico comburendo* ought to issue, whether the conviction be by the high commission, or diocesan, or convocation. (b).

Blacks. Com. Lib. iv. ch. 4. p. 43, 44. &c. 1 Hawk. P. C. ch. 23.

(b) Since our author wrote, altho no alteration has been made in the definition of heresy, which still subsists upon the foot of the statute of 1 Eliz. yet the severer part of the punishment is taken away, and the doubt removed, whether the party be liable to a writ *de hæretico comburendo*, for by 29 Car. 2. cap. 9. this writ and all proceedings thereon, and all capital punishments in pursuance of ecclesiastical censures are utterly abolished and taken away, so that heresy is now punishable only with excommunication, (except in the case of a clergyman, who is also to be deprived and degraded;) the civil effects of which are, that the party communicated is disabled from making a will Swimb. of Wills, part. 2. §. 22. or from suing for any debt or legacy, *Ibid. part 5. §. 6.* or doing any legal act, Co. Lit. 133. b. and if the party do not submit within forty days after publication, upon a *Significavit* into chancery, there issues a writ *de excommunicate capiendo*, by virtue of which he may be arrested and detained in prison, till he do submit; so that there seems now to be no material difference between a simple heretic and a relapsed heretic, for excommunication not being a definitive sentence, but only a process for contempt to enforce obedience to the sentence, whenever the party complies with it by retracting, doing penance, &c. altho a relapsed heretic, he is to be absolved.

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C H A P. XXXI.

Concerning homicide and first of self-killing or felo de se.

HAVING gone thro the pleas of the crown touching high treason, misprision of treason, and petit treason, the order that I have proposed leads me to consider of felony, &c. and these are of two kinds, felonies by the common law, and felonies made such by act of parliament,

Felonies by common law are such, as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, &c.

In the first place therefore come to be considered those felonies or offenses, that relate to life, or the taking away thereof without due process of law ; and this again is either that, which concerns the loss of life happening to a man's self, or happening to another.

As to the first of these, namely the consideration of that offense or crime, that concerns a man's own life, where there is no other offender but the sufferer, this falls under these two heads or divisions

I. *Homicidium sui-*ipfius*, or felony of a man's self.*

II. *Infortunium, or pure accident, or at least, where no other reasonable creature is concerned in the effecting of it.*

Of the former of these in this chapter.

Felo de se or *suicide* is, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison, or any other way.

No man hath the absolute interest of himself, but 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. 2. The king hath an interest in him, and therefore the inquisition in case of self-murder is *felonie & voluntarie seipsum interfecit & murderavit contra pacem domini regis.*

Co. Litt. §. 194. fol. 127. a. M. 11. Jac. Wright's case, a man to the intent to make himself impotent, and thereby to have the more colour to beg, caused another to strike off his hand, for this they were both indicted, fined and ransomed.

A man or woman as to capital offenses is of the age of discretion at fourteen years old : *vide que supra dicta sunt cap. 3.*

Compos mentis.

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If he lose his memory by sickness, infirmity, or accident, and kills himself he is not *felo de se*, neither can he be said to commit murder upon himself or any other.

If a man gives himself a mortal stroke, while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*, for tho the death complete the homicide, the act must be *that*, which makes the offense.

P. 22 E. 3. Coron. 244. Co. P. C. 54. vide supra cap. 4. who shall be said *non compos*.

It is not every melancholy or hypochondriacal distemper, that denominates a man *non compos*, for there are few, who commit this offense, but are under such infirmities, but it must be such an alienation of mind, that renders them to be madmen or frantic, or destitute of the use of reason: a lunatic killing himself in the fit of lunacy is not *felo de se*, otherwise it is, if it be at another time.

What a *voluntary killing*.

If a man voluntarily give himself a mortal wound, and die within a year and a day of that wound, he is *felo de se*, and he cannot purge the crime, nor the forfeiture inflicted by the law, by his repenting of what he had done. 8 E. 4. 4.

It must be simply voluntary, and with an intent to kill himself.

If A. with an intent to prevent a gangrene beginning in his hand doth without any advice cut off his hand, by which he dies, [413] he is not thereby *felo de se* for tho it was a voluntary act, yet it was not with an intent to kill himself.

It is said Co. P. C. p. 54. and by Mr. Dalton, cap. 92. (a), that if A. gives B. a stroke, that he falls to the ground, B. draws his knife and holds it up for his own defense, A. in haste falling upon B. to kill him falls upon the knife, whereby he is wounded to death, A. is *felo de se*, and for that they cite 44 E. 3. 44. 44 Aff. 17. where indeed it is adjudged, and that rightly, that B. is not guilty, and shall not forfeit his goods, and that it is not barely *se defendendo*, for he did not strike, only held up his knife, and so is simply not guilty; and all that Knivett says is, *Est trove, que le mort occise lui mesme*, and adjudged that B. is not guilty, nor his goods forfeit: but Knivett says not, that A. is *felo de se*, neither indeed is he, but it is only *per infortunium*.

But if A. had stricken at B. with a knife intending to kill him, and missing B. had stricken himself, and killed himself, there he had been

(a) New Edit. 1727. cap. 144

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felo de se, because that act, whereby he intended to murder *B.* shall have the same construction, if it kills himself or any other person, as it should have done, if it had taken its effect upon *B.* *de quo infra.*

Touching the forfeiture of *Felo de se.*

He doth not forfeit his lands nor his wife's dower.

But he doth forfeit his goods and chattels.

As to the relation of the forfeiture.

Baron and feme joint purchasers of a term for years, the husband drowns himself, the lease is forfeited, and the wife surviving shall not hold it against the king or almoner, *Plowd. Com.* 260. b. *Dy.* 108. Dame *Hale's* case, in which all the judges agreed, but seem to intimate different reasons: *Weston* held the relation was only to the death, but the title of the king and a common person coming together, the king's title shall be preferred, but yet they concluded, that the forfeiture relates to the first act, whereby the felony was committed, namely the throwing himself into the water, and so the king's title commenced [414] in the life of the husband, and amounted to a forfeiture in his life-time, when by law it was in his power, either by his disposal or forfeiture, as by outlawry, to bind the interest of the wife, and therefore they say, that if a villain gives himself a mortal wound, and the lord seizes the goods, and then the villain dies of the wound, the king shall have the goods against the lord, and with this agrees *Littleton*, 8 *E. 4.* 4.

That the law was well resolved in that case I do not doubt, but I am not satisfied, that the relation of the forfeiture is to the time of the stroke to all purposes, no more than in case of another felony, for suppose a man should give himself a mortal stroke and live eleven months after, how shall he support himself and his family?

But whereas in other cases of other felonies the forfeiture as to goods relates neither to the stroke, nor to the death, but to the conviction, here the forfeiture relates not barely to the presentment or inquisition, but to the death in case of a *felo de se*, for being his own executioner he prevents any formal conviction, as in other felonies.

But yet in order to this forfeiture it is necessary, that there should be a record to entitle the king, *viz.* an inquisition.

Inquisitions therefore in this case are of two kinds, *viz.* if the body cannot be seen, then it is inquisible before the justices of *oyer and terminer*, yea or before the justices of peace of the county, for it is a felony, and within the extent of their commission, *H. 37 Eliz. B. R.*

Laughton's

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Laughton's case, Co. P. C. p. 55. (b), and accordingly adjudged *M.* 1656. in *Greeve's case*.

And so if an indictment of felony be before commissioners of *oyer* and *terminer* or goal-delivery, &c. and a *fugam fecit* be presented, if process be made against those, that have the goods, the flight may be traversed, for it is but an inquest of office, and shall not conclude.

47 E. 3. 26.

But it is there held, that if an inquisition be taken before the coroner *super visum corporis*, that a man is *felo de se*, that inquisition shall be conclusive, and is not traversable by the executors or administrators of the deceased, *Co. P. C. p. 55.* and the like seems [415] to be held by *Stamford, P. C. p. 183. b.* where a *fugam fecit* is presented before the coroner *super visum corporis*, where it is found, that a murder was committed, and the murderer fled; and yet the offender himself shall be received to plead not guilty to the indictment or inquisition before the coroner, as by daily experience it appears, tho' *Stamford* makes it there a question whether the *fugam fecit* be traversable.

And therefore I remember in the king's bench in the case of *Barclay* it was ruled, that in case of an inquest before the coroner *super visum corporis*, wherein the party was found *felo de se*, the inquisition was quashed in the king's bench, because upon examination it appeared, that the coroner refused to let the jury hear witness on the part of him that was dead, to prove that he was not *felo de se*, for the coroner ought to hear evidence on both sides, partly because it was doubted, that the inquisition in this case was conclusive, and a conviction, and not traversable, and the court of king's bench, who are the sovereign coroners, did set aside that inquisition, and order the coroner to inquire *de novo super visum corporis*, because the body was yet to be viewed. *H. 1658. B. R. Barclay's case. (c)*

If an inquisition be taken before the coroner *super visum corporis*, whereby the party dead is found to have died *per infortunium*, if it is suggested on the part of the king or almoner, that he was *felo de se*, and in the king's bench a writ of *melius inquirendum* is prayed to the sheriff, it seems it ought not to be granted, because the coroner is the proper officer, and accordingly it was denied in *Pasch. 24 Car. 2.* and if granted, and an inquisition taken, it hath been held void (*d*) by the statute of *28 E. 3. cap. 9.* tho' many precedents of such writs are ex-

(b) In Margin.

(c) 2 Sid. 90, 101.

(d) 2 Andcr. 204.

tant.

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tant. *H. 37 Eliz. B. R. Croke*, n. 13. *Harleston's case*, *F. N. B.* 144, 250. (*e*)

But it seems, if the coroner's inquisition omit the finding of the goods of the *felo de se*, that may be supplied by a writ of *melius inquirendum* directed to the sheriff, for that is not within the statute of 28 *E. 3.*

[416] But whensoever any inquisition is taken by the sheriff by a writ or commission of *melius inquirendum*, without question that inquisition is traversable.

If an inquisition be taken before the coroner *super visum corporis de villis A. B. C. and D.* and says not *de quatuor villatis proximè adjacent'*, according to the statute of 4 *E. 1. de coronatoribus* (*f*), yet it hath been held the inquisition is good, because the statute is only directory. *H. 1658. B. R. Barclay's case.* (*g*)

But altho an inquisition taken before the coroner *super visum corporis* in the point of *felo de se* is of great authority and a sufficient record, whereupon process may be made against those that detain the goods found in the inquisition, yet it seems to me, that it is traversable in the very point so found, for it is but an inquest of office, and whereupon the party grieved thereby can have no atraint, but otherwise it is of a presentment of a *fugam fecit* before the coroner. 8 *E. 4. 4.*

The coroner hath power *super visum corporis* to inquire touching the murder or intersection of the party that is dead, and also of all accessaries before, and of their flight, but not of accessaries after the fact, 4 *H. 7. 18. b.* (*h*), yet the party presented before the coroner to be principal or accessory before is not convict by such presentment, but shall be arraigned and plead to the felony, and I know no difference between that and this; and it seems unreasonable, that by an inquest taken against a dead person, whereby he is found *felo de se*, that the executors, administrators, legatees, and children of the deceased should be concluded and lose the goods of the deceased without an answer, by an inquisition which may be taken by the coroner behind

(*e*) *Edit. 1718. p. 322, 554.*

(*f*) This statute was but an affiance of the common law, *Brit. 7. a.*

(*g*) 2 *Sid. 144.* See also the *King versus Crosse*, *Esq. 1 Sid. 204.*

(*h*) This case says nothing directly of the coroner's power to inquire of accessaries, yet by resolving, that in case of an accessory before the fact presented before the coroner, if it was found he fled, he

should forfeit his goods, but not so in case of an accessory after the fact, it seems strongly to imply, that the coroner had jurisdiction in the one case, but not in the other; and *Stamford* says, that the judges in that case of 4 *H. 7.* abridged the coroner of a power, which he would have usurped in inquiring of those, who were accessaries after the murder. See to this purpose *Dalies 32.*

their

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their backs, and I find no book express in it, but the opinion of my lord Coke *P. C.* 55. (*i*), for the doubt of Mr. Stamford *P. C.* 183. is only upon a *fugam fecit*, and in the case of *Barclay* 1658. the court of king's bench were not satisfied, that it was conclusive.

P. 45 E. 3. inter communia scaccarii there was a presentment (before the coroner, as it seems, but it is not so expressed in the record) that *Walter Page felonice se submersit*, & sic *felo de se* devenit, and thereupon a writ issued out of the exchequer to inquire what debts were due to *Walter Page*; the sheriffs of *London* took an inquisition, whereby it was found that *Simon Long* of *Essex* was indebted to *Walter Page* at the time of his death in 40*l.* by bill, thereupon process issued against *Simon Long* to answer the debt, who came in and confessed he owed the debt to *Walter Page*, dicit tamen, quod domino regi reddere non debet, quia qualis eorumque presentatum fuit, quod dicitur *Walterus Page* nequiter & felonice se submersit, ut praedicitur, idem *Walterus Page* interfactus fuit per emulos suos, & per ipsos in quoddam fossato in loco vocato the wilds in com. *Surrey* projectus, absque hoc, quod ipse aliqualiter se submersit; and thereupon issue was joined, and by a jury of *Surrey* found, quod dicitur *Walterus Page* fuit interfactus per emulos suos, & in fossato projectus, absque hoc, quod ipse aliqualiter se submersit,

There a traverse was taken to the presentment, which must needs be before the coroner by the whole circumstance of the case, tho' the coroner be not mentioned in the record.

And with this agrees the book of 8 *E. 4. 4.* that the finding of one to be *felo de se* is traversable, tho' found before the coroner; but indeed it holds, that a *fugam fecit* presented before the coroner is not traversable, quia auctoritatem ley de corone. (*k*)

If there be two coroners in a county, the outlawry must be given by both, ut lagatus est per judicium coronatorum, yet one of them may take an inquisition super visum corporis, *M. 6 & 7 Eliz. C. B.* (*l*).

By the statute of 3 *H. 7. cap. 1.* the coroner ought to return and certify the inquisitions taken by him to the next [418] goal-delivery, or into the king's bench.

And thus far touching *felo de se* and his forfeiture.

There is another kind of death of a man, which may be considerable in this place, namely the death of a man *per insurrectionem*, and this is of two kinds, *viz.*

(*i*) See also to the same purpose *Hob.* 237.

(*l*) See *Stamf. Placq.* 46. *b.*
(*l*) See *Hob.* 70.

1. Where

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1. Where one man is the cause of another man's death without any ill intent, and by misfortune: of this I shall treat under the distribution of homicide.

2. When a man comes to an untimely end, where no other reasonable creature concurs to it, and this is properly *per infortunium*.

As where a man falls from an horse, or house, or boat, or into a pit, or a tree or tile fall upon him and kill him, or is killed by a beast, in this case the coroner ought to take an inquiry *super visum corporis*, and also of the manner and means, how he came by his death; and of the thing, whereby it happened, and of the value thereof, because in many cases there is a forfeit belonging to the king as a deodand, whereof in the next chapter.

⁴ Blackf. Com. ch. 14. p. 189, 190. Barn. tit. Homicide. sect. 6. self-murder. 2 Hawk. P. C. ch. 27. and Foster's Discourse on Homicide, per tot.

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C H A P. XXXII.

Of deodands.

REGULARLY that moveable good, that brings a man to an untimely death, is forfeit to the king, and it is usually granted by the king to his almoner to distribute in charitable uses.

But they are not forfeit till the death be found, which is regularly by the coroner, and may be before the commissioners of goal-delivery, eyer and terminer, or of the peace, if omitted by the coroner, and hence it is, that these goods, as neither the goods of felons of themselves, felons and other outlawed persons, cannot be claimed by prescription, because there must appear a title to them by matter of record, before they are forfeited.

Upon the death of a man by misadventure, &c. the inquisition ought to inquire of the goods, that occasioned the death, and the value of them, and the *Villata*, where the mishance happened, shall be charged with process for the said goods or their value, tho they were not delivered to them. (a), 3 E. 3. Cor. 298.

And this is the reason, that in every indictment of murder, manslaughter, &c. the indictment finding, that he was killed with a sword,

(a) This case is cited from an *Act*. by Fitzherbert, who adds at the end of it, *good staves.*

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staff, &c. ought to find also the price, *viz.* 5. *solidorum*, because the king is intitled to that instrument, whereby the party was killed, or the value thereof, and that, altho it were the sword of another man, and not his, that gave the stroke, *Co. P. C.* 57, 58. tho this doth not vitiate the indictment as to the offense itself, tho the price be omitted.

Deodands are of two natures: 1. Such as do *moveare ad mortem*. 2. Such as, tho they are *quiescentia*, yet occasion [420] the party's death: *vide* statute 4 *E. 1. de officio coronatoris.*

1. Things moving to death: as if a beast kills a man, 8 *E. 2. Coron. 403.* if a man be cutting of a tree, and the tree falls upon another tree and breaks down a limb, which falls upon a man and kills him, both the limb, and the tree that fell, are deodands. 8 *E. 2. Coron. 398.*

If a man be driving of a cart, and the cart fall and kill a man, the cart and horses are a deodand. 8 *E. 2. Coron. 388.* and so if a cart run over a man and kill him, the cart and horses are forfeit, 8 *E. 2. Coron. 403.* 3 *E. 3. Coron. 326, 342.* (*b*), so if the timber that hangs a bell, fall and kill a man, the timber and bell are both forfeit. (*c*)

If a man in watering his horse is drowned, the horse is a deodand. 8 *E. 2. Coron. 401.*

If a man fall into the water, and the water carry him under the wheel of a mill, whereby he is killed, the wheel is forfeited, but not the mill. 8 *E. 2. Coron. 389.*

If a weight of earth fall upon a worker in a mine and kill him, the weight of earth is forfeit, not the whole mine. 12 *R. 2. Forfeiture 20.*

A man falls from his horse against a trunk, whereof he dies; the horse is forfeit as a deodand, but not the trunk. 3 *E. 3. Coron. 341.*

And yet I find a strong authority, that in that case the horse is not forfeited, unless he throws his rider.

Claus. 5 E. 3. part 2. m. 9. It was found by inquisition, "Quod
" Willielmus Daventriæ in parochiâ beatæ Mariæ Stroud in com.
" Middlesex, cum ad-aquavit quandam equum magistri sui, dictusque

(*b*) A cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon an high bank and over-turned, and threw a person, that was in the cart, just before the wheels of the waggon, and the waggon ran over him and kill'd him; it was resolved in this

case in the home circuit by *Pollarts* and *Gregory*, that the cart, waggon, loading, and all the horses were deodands, because they all moved *ad mortem*. 3 *Salk. 220.*

(*c*) 8 *E. 2. Coron. 403.* *vide contra Rex verus Croft, &c.* 1 *Sid. 207.*

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“ Willielmus redeundo de eodem equo per infortunium cecidit, & cum
 “ eodem equo per amicos suos semivivus deductus fuit ad hospitium
 [421] “ prædicti magistri sui apud Fleetstreet in suburbio London,
 “ & ibidem languidus vixit usque occasum solis, quo tempore
 “ obiit ex casu prædicto; & quod prædictus equus tempore casus
 “ prædicti per aliquem vel aliquam non fuit perterritus, per quod
 “ habuit occasionem recalitrandi.

This inquisition being removed into the chancery by Certiorari, thereupon it was adjudged *coram rege & concilio, quod equus prædictus tanquam deodand' regi in hoc casu non debet adjudicari*, and thereupon a writ issued to the sheriffs and coroners of London reciting the inquisition: “ Jamque dictâ certificatione coram nobis & concilio nostro inspecta & plenius examinata, nobis & dicto concilio nostro videtur, quod equus prædictus tanquam deodand' nobis in hoc casu non debet adjudicari,” commands the sheriff and coroners, “ quod ex actionem, quam Johanni Bleburgh (the master of the horse) vel plegiis, vel manucaptoribus suis in hac parte pro equo prædicto vel ejus pretio nobis tanquam deodand' reddend' fecisti, supersedeatis omnino & distinctionem in hac parte factam sine dilatatione relaxetis.”

T. R. apud Guildford 18 Novemb.

Which judgment is of greater weight, than any above cited, and may be a great guide in cases of this nature, and therefore I have cited it at large: 1. It is a resolution subsequent to all those judgments, that are above-mentioned, for the last of them is the 3 E. 3. and this is 5 E. 3. Again, 2. It is a solemn judgment given in chancery *coram rege & concilio* upon great examination, and the whole case stated in the inquisition, and every man knows, that understands any thing of records of those times, that *coram rege & concilio* was the king's legal council, namely the chancellor, treasurer, keeper of the privy seal, justices of the one bench and the other, chancellor and barons of the Exchequer: these usually met in chancery upon such occasions under the style of *concilium*.

3. It is a judgment given by the king and council *against* the forfeiture, the whole case appearing upon the inquisition, which is of greater moment, than a judgment given for the king, because given by himself and his officers against his own interest.

[422] 2. Now touching deodands of things not moveable. If a man be drowned in a pit, tho the pit cannot be forfeited, the coroner may charge the township to stop the pit, and make entry

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entry thereof in his rolls; and if it be not done before the next eyre or goal-delivery, the township shall be amerced. 8 E. 2. *Coron.* 416.

If a man falls from an hay-rick, whereby he dies, it is said (*nota*, not adjudged) that it shall be a forfeit. 3 E. 3. *Coron.* 348.

If a man be getting up a cart by the wheel to gather plums, and neither the cart nor horses moving, the man falls and dies, neither the cart nor horses are forfeit, but only the wheel. 8 E. 2. *Coron.* 409.

It seems, that if a man be under the age of fourteen years, and falls from a cart or horse, it shall not be a deodand, because he was not of discretion to look to himself; but if a horse, bull, or the like kills him, or if a cart runs over him, there it shall be a deodand, 8 E. 2. *Coron.* 389. *Stamford's P. Cor.* 21. a. *Co. P. C.* p. 57. for there it shall be imputed to the neglect of the keeper of the goods, that did the mischief, and so it is; if a tree falls upon one within the age of discretion, it is a deodand.

Touching deodands in ships or boats, these things are observable:

1. If a ship or boat be laden with merchandize, tho it falls out that a man be killed by the motion of the ship or boat, yet the merchandize are no deodand, tho it be in the fresh water; but if any particular merchandize falls upon a party, whereby he dies, that particular merchandize shall be a deodand, and not the ship. *Britton, cap. 1. de office de coroner, §. 13 & 14.*

2. If a ship or vessel be sailing upon the sea, and a person falls out of the ship and is drowned, the ship is no deodand.

By the antient constitutions of the admiralty it seems, that if a man were drowned upon the sea by falling off from the ship under sail, there was no deodand due, nor if he died by the fall of a mast or sail-yard, or otherwise; but indeed in the articles of inquiry in the court of admiralty, mentiond in the black book of the admiralty, one of the articles is to inquire of them, that take any deodands, besides [423] the admiral, of any gold, silver or jewels found upon any man slain upon the sea, drowned in the sea, or slain with a mast in the ship, or with the yard of the ship, or with any other thing, which is the cause of the death of any man, that in such case appertient *al admirale per prendre & administrare per l'alme, ce quest mort, le moieté, & l'autre moieté à donner al feme celiui, quest mort, ses infans, freres ou soers, fil ad aucunes*: but certainly this never obtained, for without question the goods of the deceased were no deodands, but only the goods that moved to his death.

Rot.

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Rot. Par. 51 E. 3. n. 73. The commons pray, Que come il ad un custome use parmy cest realme, que si aucun home ou garson eschie hors de aucun neife, batelle, ou autre vessel en le mere, haven, ou autre ewe, & soit perisse, le dit vessel ad estre forfeite au roy, ou autres seigneurs de franchises, to the great prejudice of mariners and shipping, and therefore pray, que nul neife, batell, ne autre vessel soit forfeitable desormes pur le cause avant dit.

Resp. En le mere ne doit pas deodand estre ajugge, mes quant al ewe fresh le roy ent ferra sa grace, ou lui pleyft.

The like petitions were renewed *Rot. Par. 1 H. 4. n. 154. 1 H. 5. n. 35. 14 H. 6. n. 26.* but they obtaind no other answer, than that the law be obsevered.

Yet that answer in *51 E. 3.* is a sufficient declaration, that no deodand is to be upon such a death happening upon the sea, and with this difference touching the forfeiture of a ship or other thing, as deodands *in mari & in aquâ dulci,* agrees *Braet. Lib. III. cap. 5. p. 122.* and *cap. 17. p. 136. in fine, viz.* that *de submersis in aquâ dulci batelli, de quibus tales submersi fuerunt, apprecentur, sed non in mari, nec sunt deodanda ex infortunio in mari.*

And with the same agrees *Fleta, Lib. I. cap. 25. §. 9. de submersis, si de molendino ceciderit vel carecta vel de batello, quamvis carcatis, dum sicut in aquâ dulci, secus quam in falsâ,* and goes farther, but too far, viz. that the vessel with its lading, and the cart with its lading, and the mill, with all that is moveable in it, are deodands.

[424] But now, what shall be said the sea or salt water? My lord *Coke, ubi supra, viz. p. 58.* saith, and that truly, the arm of the sea is included herein; and by the book of *22 Affize, pl. 93.* so far as the sea flows and reflows is an arm of the sea.

And thus far of deodands.

I shall only add this one thing more relating to the coroner's office touching those, that come to a violent death *de subito mortuis:* if the township bury the body before the coroner be sent for, the township shall be amerced; and if the coroner comes not to make his inquiry upon notice given, he shall be fined in *eyre,* or in the king's bench, or before the justices of goal-delivery.

See *Foster. 265. 266. 287. 288. Blackf. Com. Lib. I. ch. viii. p. 300. Burn. Tit. Deodand. 1 Hawk. P. C. ch. 26. Quare, if a man ringing a Church-bell be hanged in the bell-rope, whether the bell be forfeited as a deodand, 1 Lev. 136.*

C H A P. XXXIII.

Of homicide, and it's several kinds, and first of those considerations that are applicable, as well to murder as manslaughter.

HAVING dispatched the business of *suicidium* or self-murder, and *per infortunium simplex*, I come now to consider of homicide, as it relates to others.

And this is of three kinds: 1. Purely voluntary, *viz.* murder and manslaughter. 2. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind necessary, and this again of two kinds, *viz.* inducing a forfeiture, as *se defendendo*, or not inducing a forfeiture, as, 1. In defense of a man's house. 2. Defense of his person against an assault *in viâ regiâ*. 3. In advancement or execution of justice, [425] and according to this distribution I shall proceed.

I shall begin with those matters considerable, which are applicable as well to homicide, as to murder.

Murder is a killing of a man *ex malitia præcogitatâ*; *homicide* is killing a man without forethought malice.

It is a mistake in those, that think, that before the statute of *Marlebridge, cap. 26.* all killing of a man, tho *per infortunium* or *se defendendo*, was murder, for the statute saith, that *murdrum de cætero non adjudicetur coram justiciariis, ubi infortunium tantummodo adjudicatur, sed locum habet murdrum de interfictis per feloniam tantum, & non aliter,* and therefore they thought that before this statute a man should be hanged for killing another in his own defense. 21 E. 3. 17. b. (a).

But the truth is, *murdrum* in this case was but an amercement, that was antiently imposed upon a township, where the death of a man happened (b); and this appears by many hundred old charters of the

(a) See also a *Co. Inglit.* p. 148. who is of that opinion.

(b) This is so plain, that it is matter of surprize, that any should mistake it; the word *murdrum* usually signifying a *secret killing* of another, so that the murderer, was not known, for if the murderer was known, it was not in this sense murder; & if the murderer was taken, & *judicium sufficerit*, nullum erit *murdrum*, quia *convictus felonias*; or if the murdered person

lived for some time after his wounds, it was no murder because he might discover the murderers, the meaning of which is not, that the offender would not in those cases be liable to be indicted and punished for murder, but that the *vill* or *township* would not in such cases be liable to any amercement. *Brett Lib. III. de corona, cap. 15.* p. 135. a. *Wilt. Leg. Anglo-Sax.* p. 280. vide sup. a p. 39. ih n.ii, vide postea cap. 35. See also *Ketlyng* 121.

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kings of *England*, especially to bishops and monasteries, whereby it was granted, that they and their possessions should be quit *de murdro & latrociniis* among divers other immunities, whereby we must not think that they had power granted them to commit murder or theft, but they were thereby acquitted of those common amercements, usually in those antient times imposed in *eyre* upon vills for murder and theft committed there.

To make up the crime of homicide or murder there must be these three concurring circumstances.

I. The party must be killed, antiently indeed a barbarous assault with an intent to murder, so that the party was left for dead, but yet recovered again, was adjudged murder and petit treason, 15 [426] *E. 2. Coron. 383.* but that holds not now, for the stroke without the death of the party stricken, nor the death without the stroke or other violence makes not the homicide or murder, for the death consummates the crime.

It remains therefore to be considered, to what intents the offense of murder or manslaughter relates to the stroke or other cause of the death, and to what purposes it relates to the death only.

If a man gives another a mortal stroke, and he lives a month, two or three, or more, and die within the year and day, the title of the lord by eschete to avoid mesne incumbrances relates to the stroke given, and not only to the death. *Plowd. Com. 263. Dame Hale's case.*

If a man give another a mortal stroke, and he dies thereof within a year and a day, but mesne between the stroke and the death there comes a general pardon, whereby all misdemeanors are pardoned, this doth pardon the felony consequentially, because the act, that is the offense, is pardoned, tho it be not a felony till the party die. *Ibid. 401. Cole's case.*

If a mortal stroke be given on the high sea, and the party comes to land in *England* and die, the admiral shall not have jurisdiction in this case to try the felon, because the death that consummated the felony, happened upon the land, nor the common law shall not try him, because the stroke, that made the offense, was not *infra corpus comitatus*, 5 *Co. Rep. 106. b. Sir Henry Constable's case, 2 Co. Rep. 93. a. Bingham's case, Co. P. C. p. 48. and Lacie's case 25 Eliz.* cited there to that purpose; *de quo alibi.*

At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either,

either, but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent, and might be found tho in another county. 9 E. 4. 48. 7 H. 7. 8. and if the party died in another county, the body was removed into the county, where the stroke was given, for the coroner to take an inquest *super visum corporis*, 6 H. 7. 10. but now by the statute of 2 & 3 E. 6. cap. 24. the justices or coroner of the county, where the party died, shall inquire and proceed, as if the stroke had [427] been in the same county, where the party died.

On the other side, as to some respects, the law regards the death as the consummation of the crime, and not merely the stroke.

If a party be kild in one county, the coroner *super visum corporis* might at common law inquire of all accessaries or procurers before the fact, tho the procurement were in another county, 20 H. 7. *Kelw.* 67. b. *per omnes justiciarios Angliae*; but now by the statute of 2 & 3 E. 6. cap. 24. the indictment and trial of the accessaries shall be in the county, where they were accessory, *viz.* procuring, abetting or receiving.

If a party be mortally wounded, and the offender taken and in the custody of the constable, and he suffers him to escape before the wounded person die, it is not felony in the constable, tho he die after within the year. 11 H. 4. 12. *Plow. Com.* 401. *Cole's case*.

If a stroke be given the 1st of *January*, and the party die the 1st of *March* following, the year and day to bring an appeal is to be accounted from the death, and not from the stroke, contrary to the opinion of *Stamford P. C.* 63. a. *quod vide Co. P. C. p. 53.* & *sur statute de Glouc. cap. 9. (c), 4 Co. Rep. 42. b. Haydon's case, Statut.* 3 H. 7. cap. 1.

If A. gives a mortal stroke the 1st of *January*, and the party lives till the 1st of *February*, and then dies of the stroke, the conclusion of the indictment is best, *Et sic præfatus A. &c. modo & formâ prædictâ interfecit & murdravit*, because it applies to the whole case. 2. But if it be, *Et sic præfatus A. prædicto 1 Januarii ipsum, &c. interfecit & murdravit*, it is naught, because it is no murder till the party dies, 4 Co. Rep. 42. *Haydon's case, vide ibidem Katharine Hume's case*. 3. But if it concludes, *Et sic præfatus A. ipsum, &c. prædicto 1 Februarii interfecit & murdravit*, it is good, because then the murder is

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complete, 4 Co. Rep. 47. a. Wigge's case, tho in such a case of a stroke at one day or one place, and a death at another day or place, [428] the best conclusion, and that which is in common use at this day is, *Et sic prædictus A. ipsum, &c. modo & forma prædictis interfecit & murdravit,*

And thus far touching the relation to the stroke or death.

Now what shall be said a killing and death within the year and day.

If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled.

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines the party dies, if it can clearly appear, that this medicine, and not the wound, was the cause of his death, it seems it is not homicide, but then that must appear clearly and certainly to be so.

But if a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, tho it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati.*

If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt, which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been is homicide or murder, as the case happens, in him, that gives the wound or hurt, for he doth not die simply *ex visitatione dei*, but the hurt that he receives hastens it, and an offender of such a nature shall not appoition his own wrong, and thus I have often heard that learned and wise judge Justice Rolle frequently direct.

[429] If a man either by working upon the fancy of another or possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease, whereof he dies, tho, as the circumstances of

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the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God; and hence it was, that before the statute of 1 *Jac. cap. 12.* witchcraft or fascination was not felony, because it wanted a trial, tho some constitutions of the civil law make it penal.

If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chirurgeon, 3 *E. 3. Coron. 163.* And I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician, that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons; and therefore if they be not licensed according to the statute of 3 *H. 8. cap. 11.* or 14 *H. 8. cap. 5.* they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.

These opinions therefore may serve to caution ignorant people not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by: we see the statute of 34 & 35 *H. 8. cap. 8.* dispenseth with the penalty of those former statutes, as to outward applications and medicines for agues, stone, or strangury, which may be administered by any person, and the preamble of the statute tells us, that if none but licensed chirurgeons should be used in many cases, many of the king's subjects were like to perish for want of help.

But if a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within [430] her, and therefore he that gives a potion to this end, must take the hazard, and if it kills the mother, it is murder, and so ruled before me at the assizes at *Bury* in the year 1670.

And certainly if that opinion should obtain, that if one not licensed a physician should be guilty of felony, if his patient miscarry, we should have many of the poorer sort of people, especially remote from *London*, die for want of help, lest their intended helpers might miscarry.

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This doctrine, therefore, that if any dies under the hand of an unlicensed physician, it is felony, is apochryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, tho it may, as I said, have its use to make people cautious and wary, how they take upon them too much in this dangerous employment.

If a man have a beast, as a bull, cow, horse or dog, used to hurt people, if the owner know not his quality, he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing hurt, and the beast kills a man, by the antient Jewish law (*) the owner was to die for it, *Exod. xxi. 29*, and with this seems to agree the book of 3 E. 3. *Coron. 311. Stamf. P. C. 17.*
a. wherein these things seem to be agreeable to law.

1. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it.

2. Tho he have no particular notice, that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's case*, whose child was bit by a monkey, that broke his chain and got loose.

3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for tho he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.

4. But as to the point of felony, if the owner have no [431] notice of the quality of the ox, &c. and use all due diligence to keep him up, yet the ox breaks loose and kills a man, this is no felony in the owner, but the ox is a deodand.

5. But if he did not use that due diligence, but thro negligence the beast goes abroad after warning or notice of his condition, and kills a man, I think it is manslaughter in the owner.

6. But if he did purposely let him loose, or wander abroad with design to do mischief, nay tho it were with design only to fright people and make sport, and it kills a man, it is murder in the owner, and I have heard, that long since at the assizes held at St. Albans for *Herefordshire* it was so ruled, and the owner hanged for it, but this is but an hearsay.

(*) *Vide supra p. 3. in nota.*

If a man lay poison to kill rats, and a man casually takes it, whereby he is poisoned, this is no felony, but if a man lays poison to the intent that *B.* should take it, to be poisoned therewith, and *C.* by mistake take it, and is poisoned to death, this is murder, tho it were not intended for him. *Dalt. cap. 93. (d).* 9 Co. Rep. 81.
b. Agnes Gore's case, Plowd. Com. 474 Sander's case.

And altho the party takes the poison himself by the persuasion of another in the absence of the persuader, yet it is a killing by the persuader, and he is principal in it, tho absent at the taking of it. *4 Co. Rep. 44. b. Vaux's case.*

If *A.* gives poison to *B.* intending to poison him, and *B.* ignorant of it, gives it to *C.* a child, or other near relation of *A.* against whom he never meant harm, and *C.* takes it and dies, this is murder in *A.* and a poisoning by him, *Plowd. Com. 474. a. Dalt. cap. 93.* but *B.* because ignorant, is not guilty.

If *A.* gives purging comfits to *B.* to make sport, and not to hurt him, and *B.* dies thereof, it is a killing by *A.* but not murder, but manslaughter. *Dalt. cap. 93.*

There are several ways of killing, 1. By exposing a sick or weak person or infant unto the cold to the intent to destroy him, 2 *E. 3. 18. b.* whereof he dieth. 2. By laying an impotent person abroad, so that he may be exposed to and receive mortal harm, as [432] laying an infant in an orchard, and covering it with leaves, whereby a kite strikes it, and kills it. 6 *Eliz. Crompt. de Pace 24. Dalt. cap. 93. (e).* 3. By imprisoning a man so strictly that he dies, and therefore where any dies in gaol, the coroner ought to be sent for to enquire the manner of his death. 4. By starving or famine. 5. By wounding or blows. 6. By poisoning. 7. By laying noisome and poisonous filth at a man's door, to the intent by a poisonous air to poison him, Mr. *Dalton, cap. 93.* out of Mr. *Cook's* reading. 8. By strangling or suffocation.

Moriendi mille figuræ.

A man infected with the plague, having a plague-sore running upon him, goes abroad, this is made felony by the statute of 1 *Jac. cap. 31.* but is now discontinued (*f*) ; but what if such person goes abroad, to the intent to infect another, and another is thereby in-

(d) *New Edit. 1727. cap. 145. p. 471.* longer, than until the end of the first session

(e) *New Edit. cap. 145. p. 469.* of the next parliament.

(f) It was made at first to continue no

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fected and dies? whether this be not murder by the common law might be a question, but if no such intention evidently appears, tho *de facto* by his conversation another be infected, it is no felony by the common law, tho it be a great misdemeanor, and the reasons are,

1. Because it is hard to discern, whether the infection arise from the party, or from the contagion of the air, it is God's arrow, and
2. Nature prompts every man, in what condition soever, to preserve himself, which cannot be well without mutual conversation.
3. Contagious diseases, as plague, pestilential fevers, small pox, &c. are common among mankind by the visitation, and the extension of capital punishments in cases of this nature would multiply severe punishments too far, and give too great latitude and loose to severe punishments.

II. the second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter.

If a woman be quick or great with child, if she takes, [433] or another gives her any potion to make an abortion, or if a man strike her, whereby the child within her is killed; it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses* (g) was punishable with death, nor can it legally be made known, whether it were killed or not, 22 E. 3. *Coron.* 263. so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide.

1. E. 3. 23. b. *Coron.* 146.

But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman, in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessory to murder, if absent, and this, whether the child were baptized or not. 7 Co. Rep. 9. *Dyer* 186.

The killing of a man attaint of felony, otherwise than in execution of the sentence by a lawful officer lawfully appointed, is murder or manslaughter, as the case happens, and tho there was some doubt, whether the killing of a person outlawed of felony were homicide or no, 2 E. 3. 6. yet it is homicide in both cases. 27 Affiz. 44. *Coron.* 203.

(g) *Exod.* xxxi, 22.

If a person be condemned to be hanged, and the sheriff behead him, this is murder, and the wife may have an appeal. 35 H. 6. 58. (h)

If a man be attaint in a *præmunire* whereby he is put out of the king's protection, the killing of him was held not homicide, 24 H. 8. B. Coron. 197. But the statute of 5 Eliz. cap. 1. (i) hath now put that out of question, declaring it to be unlawful. (k)

If a man kills an alien enemy within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.

III. The third inquiry is, who shall be said a person killing. [434]

An infant under the age of fourteen, years in presumption of law is supposed without discretion, and therefore *primo facie* he cannot commit murder or manslaughter, but being indicted thereof, upon not guilty pleaded he ought to be found not guilty.

But if he be above that age, in presumption of law he is of discretion, and may be guilty.

But if he be under the age of fourteen, yet if upon circumstances it can appear, that he hath discretion, he may be convict of felony. 3 H. 7. 1. b. 12. a. (l)

If a man be *non compas mentis*, and kill a man, he is to plead not guilty, and shall be acquitted, and is not driven to purchase a pardon, tho antiently it was so used. Stamford's P. C. 16. b. &c. *libros ibi*.

And the same law it is of a lunatic, that kills a man in the time of his lunacy; but if it be in those intervals, when he hath his understanding, then he is a felon, *sed de his supra. p. 31.*

If there be an actual forcing of a man, as if A. by force takes the arm of B. and the weapon in his hand, and therewith stabs C. whereof he dies, this is murder in A. but B. is not guilty. *Dals. cap. 93. p. 242. (m). Plowd. Com. 19. a.*

But if it be only a moral force, as by threatening, dures, or imprisonment, &c. this executeth not.

A *feme covert* is in law under the exercion of her husband, and therefore, if she commit hanging or burglary together with her hus-

(b) See also Co. P. C. p. 52. *quare*, in case of treason, (where the sentence is, that the party shall be hanged, but not till he be dead, &c.) if the king remit all, but the hanging, whether it be not murder in the sheriff to hang him till he be dead?

(i) *In fine.*

(k) See Coron. 202. where it is declared felony to kill one outlawed for felony.

(l) *Vide supra. p. 27.*

(m) New Edit. cap. 245. p. 473.

band,

band, the husband is in law guilty, but regularly the wife is not guilty. *Siamf.* 26. *a.* *Coron.* 160. *Dalt. cap.* 104. *p.* 267 (*n*)

But if she commit murder, or treason, or manslaughter, it is no plea to say she did it by coercion of her husband, but she is guilty, tho committed with her husband. *Dalt. Ibid.*

See Foster's Discourse II. of homicide per tot. 255. &c. &c. Black. Com. Lib. iv. ch. iv. p. 60. ch. xiv. p. 188, 189. &c. 1 Hawk. P. C. ch. 28, 29, 30, 31, 32. 3 Wilon. 406. &c. Foster. 70. The case of William York.

[435]

C H A P. XXXIV.

Concerning commanding, counselling, or abetting of murder or manslaughter.

ALTHO this title may seem more proper under the title of *principal and accessories*, yet because it relates to the inquiry, who shall be said a murderer or manslayer, and is common in some respects to both crimes, I shall take up the consideration thereof here.

He that counsels, commands, or directs the killing of any person, if he be absent, is an accessory to murder before the fact.

In case of poisoning, he that counsels another to give poison; if that other doth it, the counsellor, if absent, is but accessory before Coke P. C. p. 49. Sir Thomas Overbury's case. (*a*)

But he that actually gives or lays the poison to the intent to poison, tho he be absent, when it is taken by the party, yet he is principal, and this was Weston's case (*b*), Co. P. C. p. 49. in Sir Thomas Overbury's case, and 4 Co. Rep. 44. b. Vaux's case.

In case of murder, he that counselled or commanded before the fact, if he be absent at the time of the fact committed, is accessory before the fact, and tho he be in justice equally guilty with him that commits it, yet in law he is but accessory before the fact, and not principal.

If *A.* commands *B.* to beat *C.* and he beats him so that he dies thereof, it is murder in *B.* and *A.* if present, is also guilty of the offense, if absent, he is accessory to murder. *Dalt. cap.* 93. (*c*). *Plowd. Com.* 475. *b.* *Co. P. C.* p. 51, 3 *E. 3. Coron.* 314.

(*n*) New Edit. cap. 157. p. 503.
(*a*) See State Tr. Vol. I. p. 331.

(*b*) State Tr. Vol. I. p. 313.
(*c*) New Edit. cap. 145. p. 472.

If *A.* counsel *B.* to poison his wife, *B.* accordingly obtains poison from *A.* and gives it his wife in a roasted apple, the wife gives it to a child of *B.* not knowing it was poison, who eats it and dies, this is murder in *B.* tho he intended nothing to the child. *Plowd. Com.* 474. *Saunder's case:* and so it is, if an apothecary sends a potion to the wife, and the husband mingle poison with it, and upon some dislike of the physic the apothecary is sent for, who to justify it to be wholesome voluntarily eats part of it, and is poisoned and dies, this is murder in *B.* tho the apothecary was never intended to be hurt, but voluntarily took it. 9 *Co. Rep.* 81. *Agnes Gore's case.*

But in this case, he who was absent, and counselled the poisoning of the wife, is not necessary to the murder, because as to him the command shall not be construed further, than as to the person intended by him. *Plowd. Com.* 474. *Saunder's case. (d)*

If *A.* counsel or commands *B.* to beat *C.* with a small wand or rod, which could not, in all human reason, cause death, if *B.* beats *C.* with a great club, or wound him with a sword, whereof he dies, it seems, that *A.* is not necessary, because there was no command of death, nor of any thing, that could probably cause death, and *B.* hath varied from the command in substance, and not in circumstance.

If *A.* command or counsel *B.* to kill *C.* and before the fact done *A.* repents, and comes to *B.* and expressly discharges him from the fact, and countermands it, if after this countermand *B.* doth it, it is murder in *B.* but *A.* is not necessary, but if *A.* repent of it, but before any discharge or countermand given to *B.* *B.* kills *C.* yet *A.* remains necessary notwithstanding his private repentance, for in as much as his express counsel or command occasions the fact, he must at his peril see, that he countermand *B.* and so remedy as much as in him lies the mischief, that his former command occasioned. *Ca. P. C.* [437] p. 51. *Plowd. Com.* 476. *a. Saunder's case.*

In manslaughter there can be no necessities before the fact, for it is presumed to be sudden, for if it were with advice, command, or deliberation, it is murder and not manslaughter, and the like of *se defendendo.*

(d) But tho the judges were of opinion in this case, that he was not necessary, yet they thought it properest that he should be delivered rather by a pardon, than otherwise, and accordingly they kept him in prison from one session till another, till he

procured a pardon; and master *Plowden*, the reporter, says, it was his opinion, that whoever counsels or commands an evil thing should be adjudged necessary to all, which follows from that evil action, but not from any other distinct thing.

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And therefore in an indictment of manslaughter only, if others be indicted as accessaries before the fact, the indictment is void against them.

And if *A.* be indicted of murder, and *B.* as accessory before by procurement, &c. and *A.* is found guilty only of manslaughter, *B.* shall be discharged. 4 Co. Rep. 43. b. *Goffe versus Bibithe and Hoell David.*

And anciently, he that struck the stroke, whereof the party died was only the principal, and those, that were present, aiding, and assisting, were but in the nature of accessaries, and should not be put upon their trial, till he that gave the stroke were attaint by outlawry or judgment. 40 Aff. 25. 40 E. 2. 42. a.

But at this day, and long since, the law hath been taken otherwise, and namely, that all that are present, aiding, and assisting, are equally principal with him that gave the stroke, whereof the party died. 4 H. 7. 18. a. *per omnes justiciarios utriusque banci*, for tho one gave the stroke, yet in interpretation of law it is the stroke of every person, that was present, aiding, and assisting, and tho they are called principals in the second degree, yet they are principals, and the law was altered herein, *in tempore H. 4. Plowd. Com. 100. a.* and therefore, if there be an indictment of murder or manslaughter against *A.* that *A.* felonice, &c. percutit *B.* whereof he died, and that *C.* and *D.* were present, abetting, aiding, and assisting to *A. ad feloniam & murdrum &c. modo & formâ prædictâ faciendâ*, and *A.* appears not, but *B.* and *C.* appear, they shall be arraigned, and receive their judgment if convict, tho *A.* neither appears, nor be outlawed. *Plowd. Com. 97* and 100. *Gyttin's case.*

If *A.* be indicted as having given the mortal stroke, and *B.* and *C.* [438] as present, aiding, and assisting, and upon the evidence it appear, that *B.* gave the stroke, and *A.* and *C.* were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all, for it is only a circumstantial variance, for in law it is the stroke of all that were present, aiding, and abetting. *Plowd. Com. 98. a. 9 Co. Rep. 67. b. Mackally's case.*

Yet the circumstances of the case may vary the degree of the offense in those that are in this kind parties to the homicide.

If *A.* have malice against *B.* and lies in wait to kill him, and *C.* the servant of *A.* being present, but not privy to the intent of his master, finds his master fighting with *B.* takes part with his master, and the servant

servant or master kill *B.* this is murder in *A.* because he had malice forethought, but only homicide in *C.* *Plowd. Com.* 100. *b. Salisbury's case,* where it was also resolved, that where *A.* had malice against *D.* the master of *B.* but by mistake assaults and kills *B.* the servant, or having malice against *D.* the master, and *B.* his servant comes in aid of his master, and *A.* kills him, it is murder in *A.* as much as if he had killed the master, for the malice shall be carried over to make the killing of *B.* murder.

Upon an indictment of murder, tho the party upon his trial be acquit of murder, and convict of manslaughter, he shall receive judgment, as if the indictment had been of manslaughter, for the offence in substance is the same.

And upon the same reason it is in case of malice implied, if *A. B.* and *C.* be in a tumult together, and *D.* the constable comes to appease the affray, and *A.* knowing him to be the constable kill him, and *B.* and *C.* not knowing him to be the constable, come in, and finding *A.* and *D.* struggling, assist and abet *A.* in killing the constable, this is murder in *A.* but manslaughter in *B.* and *C.*

To make an abetter to a murder or homicide principal in the felony, there are regularly two things requisite, 1. He must be present. 2. He must be aiding and abetting *ad feloniam & murdrum sive homicidium.*

If he were procuring, or abetting, and absent, he is accessory in case of murder, and not principal, as hath been [439] shewn, unless in some cases of poisoning, *ut supra.*

If he be present, and not aiding or abetting to the felony, he is neither principal nor accessory.

If *A.* and *B.* be fighting, and *C.* a man of full age comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide, as principal in the second degree, but it is a misprision, for which he shall be fined, unless he use means to apprehend the felon. 8 *E. 2. Coron.* 395. 3 *E. 3. ibidem* 293. 14 *H. 7.* 31. *b. Stamford's P. C.* 40. *b. Dalton, cap.* 108. *p.* 284. (e)

Therefore it remains to be inquired, 1. Who shall be said to be present. 2. Who shall be said abetting, aiding or assisting to the felony.

I. As to the first: if divers persons come to make an affray, &c. and are of the same party, and come into the same house, but are in several rooms of the same house, and one be killed in one of the rooms,

(e) *New Edit. cap.* 161. *p.* 527.

those

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those that are of that party, and that came for that purpose, tho in other rooms of the same house, shall be said to be present. *Dalt. cap. 93. p. 241. (f)*

The lord *Dacre* and divers others came to steel deer in the park of one *Pelham, Rayden* one of the company killed the keeper in the park, the lord *Dacre* and the rest of the company being in other parts of the park, it was ruled, that it was murder in them ^{and} and they died for it. *Crompt. 25. a Dalt. ubi supra, 34 H. 8. B. Coron. 172. (g)*

The like in case of burglary, tho some stood at the lane's end or field-gate to watch if any came to disturb them, *Co. P. C. p. 64. 11 H. 4. 13. b.* yet they are said to be burglars, because present, aiding, and assisting to the burglary.

II. Who shall be said abetting, aiding and assisting.

If *A.* comes and kills a man, and *B.* runs with an intent to be assisting to him, if there should be occasion, tho *de facto* he doth nothing, yet he is principal being present, as well as *A.* 3 E. 3. *Coron. 309.*

If divers come with one assent to do mischief, (*male faire*) [440] as to kill, rob or beat, and one doth it, they are all principals in the felony, &c. 3 E. 3. *Coron. 314.*

If *A.* and divers others in his company intending to rob a person charge him with felony, and as they are carrying him to gaol, some of the company rob the person attached, this is robbery in all, but if the rest of the company come without any such intent, it seems they are not guilty. 3 E. 3. *Coron. 350.*

If *A.* comes in company with *B.* to beat *C.* and *B.* beats *C.* that he die, *A.* is principal, but then, according to those elder times, the indictment must not be only, that he was present, aiding, and assisting, for that, as the law was then taken, makes him only accessory, but the indictment must shew the special matter, that they came to that intent, 19 E. 2. *Coron. 433.* but now that course is altered, and the indictment only runs, that *A.* was present, aiding, and assisting, and that is sufficient to make him principal.

So if *A.* being present commands *B.* to kill *C.* and he doth it, both are principals. 13 H. 7. 10. a. (h)

(f) *New Edit. cap. 145. p. 472.*

(g) See also *Moor 86. Kelynge 56.*

(h) This case was something more than a bare command, for one held him, while

the other killed him; but what our author here says is more directly proved by the case in 4 H. 7. 18. a.

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If many be present, and one only gives the stroke, whereof the party dies, they are all principals, if they came for that purpose.

21 E. 4. 71. a.

The case of *Drayton Baffet* reported by Mr. *Crompton*, fol. 28. was this: *A.* with thirty others and more entered with force upon the manor-house of *Drayton Baffet*, and ejected *B.* his children, and servants out of the same; afterwards twenty others on the behalf of *B.* three days after, in the night, came with weapons with intent to re-enter, and one of the twenty, about ten of the clock in the night, cast fire into a thatcht house adjoining to the house, whereupon one that was in the house shot off a gun, and killed one of the party of *B.* and then the rest of the party of *B.* fled, and *A.* and his company continued the forcible possession of the house for many days after, whereupon *A.* and twenty-seven more were indicted of murder, and arraigned in the king's bench, and the matter aforesaid given [441] in evidence against him, and Mich. 22 & 23 Eliz. he was found guilty of manslaughter, & divers autres de rioters, que fueront in le meason al temps, que le home fuit tue, fueront arraigns come principals, coment que ne afferent al setter del gunne ne al tuer, purceo que fueront la illoyalment assemblies, & in forcible manner gard le meason oue A. que fuit convict.

And consonant to this is Mr. *Dalton*, p. 241. (i) in these words:

" Note also, that if divers persons come in one company to do any
" unlawful thing, as to kill, rob or beat a man, or to commit a riot,
" or to do any other trespass, and one of them in doing thereof kill
" a man, this shall be adjudged murder in them all that are present of
" that party abetting him, and consenting to the act, or ready to aid
" him, altho they did but look on.

A man seizeth the goods of a *Frenchman* in time of war, and carries them to his house, a stranger pretending to be deputy-admiral with a great multitude of men came with force to the house, where the goods were, and at the gate of the house made an assault upon them that were in the house, a woman issued out of the house without any weapon, and is killed by one of the servants, who came to take the goods, by throwing a stone at another, that was in the gate, and the person, that came to seize the goods, said, (before his coming) he would make him a cokes that kept the goods and would make him to know the basest in his house. By five judges, two serjeants, the queen's

(i) *New Edit.* p. 472.

attorney,

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attorney, and solicitor, it was held, that if it appear that the woman came in defense of the master of the house, then it was murder in the vice-admiral and all his companions: but by other five judges contrary, for no malice was against the woman, and murder shall not be extended further, than it was intended, and the former held, that if *A.* and *B.* fight by appointment before-hand, and a stranger comes between them to part them, and he is killed by *A.* it is murder in him, and some said in both, but the others *noluerunt* [442] *ad hoc concordare. Mansell and Herbert's case, H. 2 & 3 P. & M. Dyer 128. b.*

That point, wherein the judges differed, was whether the mistake of the person excuseth it from murder, but it seems not questioned, but all agreed it manslaughter, and that not only in him, that gave the blow but in all the companions of that party: but now the former point is sufficiently settled, that if it had been murder, in case the man had been killed, that was meant, it is murder in killing the woman, and that, whether she came as a partisan to *Mansell*, the owner of the house, or not, *quod vide supra*: and in the last case put, in *Herbert's case* before, it is certainly murder in him that kills the man that comes to part them, and if it had been only a sudden quarrel, it had been manslaughter in him that kills him, and *Dalt. cap. 93. p. 240. (k)* yea, and if the combating were by malice prepense, it is held, that the killing of him, that comes to part them, is murder in both, and both were hanged for it, because each of them had a purpose to have kild the other. 22 *E. 3. Coronæ 262. Lambert out of Dallison's report, p. 217.* but that seems to me to be mistaken, it is not murder in both, unless both struck him that came to part them; and by the book of 22 *Aff. 71. Coronæ 180.* (which seems to be the same case, tho more at large,) he only that gave the stroke, had judgment, and was executed. (l)

And therefore it is a mistake in those that say, if it be not known which of them did it, they shall both have judgment, for the jury ought precisely to inquire, and upon circumstances to satisfy themselves, whether the one, or the other, or both did it; and neither to acquit, nor convict both, because they know not who did it.

(k) New Edit. cap. 145. p. 472.

(l) The other doth not appear to have been before the court, but upon putting

the case, the const. said, he that struck is guilty of felony, but said nothing as to him, who did not strike.

But

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But to return to the aiders and abettors again.

By the cases of *Drayton Basset* and *Herbert* it appears, that if many come to commit a riotous unlawful act, if in the pursuit of that action one of them commits murder or manslaughter, they are all guilty, that are of that party, that committed the disorder ; [443] wherein nevertheless these things must be observed.

1. In that case it must be intended, when one of the same party commits the murder or manslaughter upon one of the other party, or upon those that came to appease or part them, or by due course of law to disperse them.

And therefore I have always taken the law to be, that if *A.* and *B.* have a design to fight one with another upon premeditation or malice, and *A.* takes *C.* for his second, and *B.* take *D.* for his second, *A.* kills *B.* in this case *C.* is principal, as present, aiding, and abetting, but *D.* is not a principal, because he was of the part of him, that was killed, and yet I know, that some have held, that *D.* is principal as well as *C.* because it is a compact, and rely much upon the book of 22 E. 3. Coron. 262. before-mentioned, but, as I think, the law was strained too far in that case, and so it is much more in making, *D.* a principal in the death of *B.* that was his friend, tho' it be, I confess, a great misdemeanor, yet I think it is not murder in *D.*

And the books in all the instances of this nature say, that it is murder or manslaughter in that party, that abetted him (*), and consented to the act, but *D.* never abetted *A.* to kill *B.* but abetted *B.* indeed to have killed *A.*

2. It must be a killing in pursuit of that unlawful act, that they were all engaged in, as in the case of the lord *Dacre* before-mentioned, they all came with an intent to steal the deer, and consequently the law presumes they came all with intent to oppose all that should hinder them in that design, and consequently when one killed the keeper, it is presumed to be the act of all, because pursuant to that intent : but suppose, that *A.* *B.* and *C.* and divers others come together to commit a riot, as to steal deer, or pull down inclosures, and in their march upon the design, *A.* meets with *D.* or some other with whom he had a former quarrel, or that by reason of some collateral provocation given by *D.* to *A.* *A.* kills him without any

(*) *viz.* who committed the homicide?

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abetting by any of the rest of his company, this doth not make all
[444] the party of *A.* tho present, to be therefore aiding and abetting, and consequently principals in this murder or manslaughter, which was accidental, and not within the compass of their original intention.

But if, when they had come to steal the deer, or throw down the inclosure, any had opposed them in it, either by words or actual resistance, and *A.* had killed him, it had been murder in all the rest of the company, that came with the intent to do that unlawful act, tho there were no express intention to kill any person in the first enterprize, because the law presumes they come to make good their design against all opposition.

And this is the reason of the book 3 *E. 3. Coron. 350.* where many came to commit a disseisin, and one was killed, and all that were of the company were arraigned as principals, and the fact found and they were condemned, tho the jury said they did nothing (*de male volunt*) of malice, but were of the company; tho possibly, as the circumstances of that case were, it was only manslaughter, as in the case of *Drayton Basset*, because it was upon a sudden, and upon a pretense of title.

3. Again, altho if any come upon an unlawful design, and one of the company kills one of the adverse party in pursuance of that design, all are principals; yet if many be together upon a lawful account, and one of the company kills another of an adverse party without any particular abetment of the rest to this fact of homicide, they are not all guilty that are of the company, but only those, that gave the stroke, or actually abetted him to do it.

There is a common nuisance committed in the highway by *A. B. C. D.* in the vill of *M.* and *E. F. G. H. J. &c.* and twenty more of the inhabitants of *M.* come to remove the nuisance, *A. B. C.* and *D.* oppose, *F.* strikes *A.* suddenly, and kills him, *F.* is guilty of manslaughter, but the rest of the party of *F.* are not therefore guilty, barely upon this account that they were of the company, but only such of the company, as did actually assist or abet *F.* to strike or kill *A.*

But if in truth it were no nuisance, but an act that was lawfully done by *A.* and then *A.* had been killd by *F.* all the rest of the [445] party and company of *F.* had been guilty, that came with design to remove that which they thought a nuisance, but was not, because it was a riotous and unlawful assembly. . .

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If *A.* hath a good title to his house, or hath been in possession thereof for three years, (in which case he may detain it with force by the statute of 8 H. 6. cap. 9.) if any person comes to rob him or kill him, and he shoot and kill him, it is not felony, nor doth he forfeit his goods, as in case of homicide *se defendendo.* 11 Co. Rep. 82. b. 5 Co. Rep. 91. b.

But if *A.* comes to enter with force, and in order thereunto shoots at his house, and *B.* the possessor, having other company in his house, shoots and kills *A.* this is manslaughter in *B.* and so it is ruled 5 Eliz. in Harcourt's case, Crompt. 29. a. Dalt. cap. 78. p. 105. (m). Ibid. cap. 98. p. 250. (n)

And in this case, if *B.* shoots out of his house, and killeth *A.* I think it plain, that it is not felony in the rest of the household, nay, tho he had hired extraordinary company to help to guard his house upon such an occasion, (as by law it seems he may do, notwithstanding the opinion of Crompton, fol. 70. a. to the contrary, vide 21 H. 7. 39. a. 5 Co. Rep. 91. b. Seaman's case, 11 Co. Rep. 82. b. Lewes Bowle's case) yet this is not man-slaughter in the rest of the company, because the assembly was lawful and justifiable.

And therefore in that case, no others of the company, that are in the house, shall be said guilty, but only such as actually abet him to do the fact; and these indeed will be principals by reason of actual abetting, but not barely upon the account of being in the house, and of the same company, because the assembly to defend the house by lawful means was lawful.

But in the case of a riotous assembly to rob, or steal deer, or do any unlawful act of violence, there the offense of one is the offense of all the company; as in the case of the lord *Dacre*, and of the house of *Drayton Basset*, where there was first a riotous and unlawful entry, and keeping possession by those that shot.

4. If there be many, that are present, abetting, aiding, [446] and assisting, tho all may, as in the cases afore shewn, be guilty of homicide, yet upon different circumstances some may be guilty of homicide, and not of murder, others may be guilty of murder; vide the case of *Salisbury* before, Plowd. Com. 101. a. The master assaults with malice prepense, the servant being ignorant of the malice of his master, takes part with his master, and kills the other, it is manslaughter in the servant, and murder in the master.

(m) New Edi. cap. 107. p. 427.

(n) cap. 150. p. 483

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Upon a sudden falling out between *A.* and *B.* in the street, *B.* gathers many of his friends together to assault *A.* and *A.* doth the like, the constable, and some in his aid, come to part the affray, and keep the peace. *A.* hath notice, that he is the constable, but divers of his company know it not, nor could reasonably or probably know it, *A.* kills the constable, this is murder in *A.* but the rest of his company, that knew it not, are not guilty of the murder.

But such of them, as knowing it to be the constable, yet abetted *A.* to kill him, are guilty of murder, those that knew it not, and yet abetted *A.* to kill him, are guilty of manslaughter ; and those, that neither knew him to be the constable, nor did actually abet nor assist *A.* to kill him, are not guilty, as it seems, because this was a new emergency, and out of the bounds and verge of the quarrel, wherein they were before engaged, and such whereunto these were not privy ; *quod tamen quare.*

See Foster 121—131. and his discourse III. p. 341.—per tot. 4 Blackf. Com. ch. 3. p. 34—40. See Index to 1 Hawk. P. C. ut. Accesary.

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C H A P. XXXV.

Concerning the death of a person unknown, and the proceedings thereupon.

BECAUSE this chapter as well concerns *murder* as *manslaughter*, before I come to examine the particular offenses themselves, I shall subjoin a few words touching this title.

Antiently there was a law introduced by *Canutus the Dane*, that if any man were slain in the fields, and the manslayer were unknown, and could not be taken, the township, where he was slain, should be amerced to sixty-six marks (*), and if it were not sufficient to pay it, the hundred should be charged, unless it could be made appear before the coroner, upon the view of the body, that the party slain were an *Englishman*, and this *making it appear* was various, according to the custom of several places, but most ordinarily it was by the testimony of two males of the part of the father of him that was slain, and by two females of the part of his mother.

(*) See the laws of *Edward the confessor*, Lib. XV. & XVI. by which it appears the amerciament was XLVI. marks, and not LXVI. marks, as *Bretton* says, which mis-

take might probably be occasioned, as *Wilkins* observes in his notes ad *Ley. Anglo-Sax.* p. 280. by the transposition of the numerical letters L and X.

And

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And this amerciement was usually called *murdrum*; and the presentment and proof, that the party slain was an *Englishman*, was called *Englebury*, and presentment of *Englebury*.

And this was therefore provided to avoid the secret murder of the *Danes*, who were hated by the *English*, and oftentimes privily murdered; this appears by *Braeton* (a), and is transcribed out of him by *Statf. Lib. I. cap. 10. fol. 17.*

When *William* the first came in, he found the like animosity by the *Danes* and *Saxons* against the *French* and *Normans*, who were many times secretly killed by the natives, and therefore he did in effect continue this law (†), only he applied it to the *French* and *Normans*, viz. that if a person were slain by an unknown [448] hand, if he were a *Frenchman* or a *Norman*, the hundred was amerced, where he was found, and if they were insufficient, then the county, which was sometimes 36l. sometimes 24l.

And tho this was instituted for the preservation of the *French* and *Normans*, yet intermarriages happening between the natives and them, so that in proces of time they became, as it were, one people, the same custom was continued as to all persons that were killed by unknown hands, and this amerciament was called *murdrum* †.

This appears at large by the black book of the Exchequer written by *Gervafius Tilburiensis*, *Lib. I. cap. Quid murdrum, &c quare fit dictum*, which expounds the true scope of the statute of *Marlbridge*, *cap. 26. Quod murdrum de cætero non adjudicetur pro mortuo per infortunium.*

But as well the presentment of *Englebury*, as the amerciament for secret homicide by persons unknown, was taken away by the statute of 14 E. 3. *cap. 4.* yet there remained a certain amerciament upon the township, where a person was slain, and the offender escaped, viz. If a person were slain in the day-time, in a town walled, or not walled, the town is to be amerced, if the vill be not sufficient, the hundred shall be charged, and on default of them the county.

If he be slain in the day-time out of any vill, the hundred shall be amerced, and on their disability the county shall be charged with the amerciament.

(a) *Lib. III. de corona cap. 15. p. 134. b. 280.*
vide Specim. verb. Engleboria. Blasif. Com.

Lib. IV. cap. 14. p. 195. + By the word "murder" in grants, the grantee claimed to have amerciaments of

(†) *Vide Leg. Gal. Cap. I. a 6. & Leg. murderem. Bro. tit. Qyswarrants. P. 2.*
Hen. I. l. 91. Wilk. Leg. Anglo-Sax. p. 224.

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If a man be killed either in day or night, and the offender be taken and committed to the constable, or to the vill, if he escape, the township where the party was slain, or where the offender was taken, shall be fined. (*b*)

But if a person be slain in the day or night in a walled town, and the offender be not taken, the town or city shall be fined.

If any private person be present when a murder or manslaughter is committed, and doth not his best endeavour to apprehend [449] the malefactor, he shall be fined and imprisoned.

All which differences appear by comparing the books of *Stamf. P. C.* cap. 30 & 31. *Coke P. C.* cap. 7. p. 53. 3 *H. 7.* cap. 1. and the books there cited.

(*b*) For the vill is not discharged till he be delivered into goal, or to the custody of the sheriff, after which the sheriff will be chargeable. *Stamf. P. C.* cap. 81.

C H A P. XXXVI.

Touching murder, what it is, and the kinds thereof.

MURDER and manslaughter differ not in the kind or nature of the offense, but only in the degree, the former being the killing of a man of malice prepense, the latter upon a sudden provocation and falling out.

And therefore it is, that upon an indictment of murder the party offending may be acquitted of murder, and yet found guilty of manslaughter, as daily experience witnesseth (*a*), and they may not find him generally *not guilty*, if guilty of manslaughter.

In an appeal of murder it is agreed on all hands, that the jury may find him not guilty of the murder, and guilty of manslaughter; this was accordingly ruled (*b*) *P. 34 Eliz. B. R.* the case of *Wroth and Wigges* (*c*). *P. 5 Jac. B. R. n. 20. Pellet and Barendon*, *P. 7 Jac. B. R. n. 11. (d)*; but it hath been held, that altho upon an indictment of murder, if the party appear to be guilty of manslaughter, the jury ought not to acquit him generally, but find him guilty of

(*a*) See *Dalison* 14.

296. 1 *Sid.* 325.

(*b*) Or rather taken for granted.

(*d*) These two cases I do not find any

(*c*) *Cr. Eliz. 276.* See also *Cr. Eliz.*

where among the printed reports.

manslaughter; yet in an appeal of murder, tho the jury may, if they please, find him guilty of manslaughter, if the fact be such, yet they may find generally, that he is *not guilty*, because it is the suit of the party, and he should lay his case according to [450] the truth.

With this agrees *H. 38 Eliz. B. R. Penryn and Corbett (e)*, *H. 38 Eliz. B. R. B. 183. (f)*, *M. 22 Jac. B. R. L. 278. Blount's case (g)*, but it was held *P. 2 Car. I. in Baffage's case (h)*, that they may not in such a case find a general verdict of *not guilty*, but must find him guilty of manslaughter, because included in murder, as well in case of an appeal, as in case of an indictment, and so it seems the law is.

The difference between the offenses of murder and manslaughter seems to rest in these particulars.

1. In the degree and quality of the offense, for murder, as hath been said, is accompanied with malice forethought, either express or presumed; but bare homicide is upon a sudden provocation or falling out.

2. And therefore in murder there may be accessories before, as well as after, because ordinarily it is an act of deliberation, and not merely of sudden passion; but in bare homicide or manslaughter there can be no accessories before, tho there may be accessories after, and therefore, if an indictment be of murder against *A.* and that *B.* and *C.* were counselling and abetting as accessories before only, (and not as present, aiding and abetting, for such are principals, as hath been said) if *A.* be found guilty only of homicide, and acquit of the murder, the accessories before are hereby discharged.

3. The indictment of murder essentially requires these words, *felonice ex malitia sua præcogitatâ interfecit & murdravit*, but the indictment of simple homicide is only *felonice interfecit*.

4. Altho at common law, and by the statute of 25 *E. 3. cap. 4.* clergy was promiscuously allowed, as well in case of murder, as of homicide and manslaughter, yet by the statute of 23 *H. 8. cap. 1.* 25 *H. 8. cap. 3.* 1 *E. 6. cap. 12.* 5 & 6 *E. 6. cap. 10.* clergy is taken away from murder *ex malitia præcogitatâ*.

Now having before, *cap. 33.* declared those things, that are common to the offenses of murder and manslaughter, it re- [451]

(e) *Cro. Eliz. (464.)*

(g) *2 Roll. Rep. 460.*

(f) I suppose this may be the case of *Goff and Byby, Cro. Eliz. 540.*

(h) *Latch 126.*

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mains, that I consider those things, that are specifical and peculiar to murder, which is what shall be said a killing *ex malitia præcogitatæ*, or what in law is said such a malice, as makes the offense of killing a person thereby to be murder.

Such a malice therefore, that makes the killing of a man to be murder, is of two kinds, 1. Malice in fact, or 2. Malice in law, or *ex præsumptione legis*.

Malice in fact is a deliberate intention of doing some corporal harm to the person of another.

Malice in law, or presumed malice, is of several kinds, *viz.* 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person killed, *viz.* a minister of justice in execution of his office. 3. In respect of the person killing.

Touching the first of these in this chapter, *viz.* malice in fact.

Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized.

The evidences of such a malice must arise from external circumstances discovering that inward intention, as lying in wait, menacing antecedent, former grudges, deliberate compassings, and the like, which are various according to variety of circumstances.

It must be a compassing or designing to do some bodily harm.

If there have been a long suit in law between *A.* and *B.* either touching interest or wrong done, as if *A.* sues *B.* or threaten to sue him, this alone is not a sufficient evidence of malice prepense, tho' possibly they meet and fall out, and fight, and one kills the other, if it happen upon sudden provocation; but this may by circumstances be heightened into a malice prepense, as if *A.* without any new provocation strike *B.* upon the account of that difference in law, whereof *B.* dies, or *&c converso*, or if he lie in wait to kill him, or comes with a resolution to strike or kill him, for in such a case the difference in the law-suit, (which alone makes not malice) is coupled and joined with circumstances, that prove the purpose of the party was [452] more, than the law allows in a legal vindication of wrong done.

If there be an old quarrel betwixt *A.* and *B.* and they are reconciled again, and then upon a new and sudden falling out *A.* kills *B.* this is not murder, but i upon circumstances it appears, that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then it is murder.

If

If there be malice by *A.* against *B.* and by *B.* against *A.* and they meet, and upon the account of that malice *A.* strikes *B.* and *B.* thereupon kills *A.* (otherwise than in his own necessary defense) it is murder in *B.* but if they meet accidentally, and *A.* assaults *B.* first, and *B.* merely in his own defense, without any other malicious design kills *A.* this is not murder in *B.* for it was not upon the account of the former malice, but upon a new and sudden emergency for the safeguard of his life; but if *A.* and *B.* had met deliberately to fight, and *A.* strikes *B.* and pursues *B.* so closely, that *B.* in safeguard of his own life kills *A.* this is murder in *B.* because their meeting was a compact, and an act of deliberation, and therefore all, that follows thereupon, is presumed to be done in pursuance thereof, and thus is Mr. Dalton, cap. 93. p. 241. (*i*) to be understood.

But yet *quare*, whether if *B.* had really and truly declined the fight, ran away as far as he could, (suppose it half a mile,) offerd to yield, and yet *A.* refusing to decline it had attempted his death, and *B.* after all this kills *A.* in his own defense, whether it excuseth him from murder; but if the running away were only a pretense to save his own life, but was really designed to draw out *A.* to kill him, it were murder.

A. commands *B.* to kills *C.* and before the act done repeals, and countermands *B.* and charges him not to do it, yet *B.* doth it, *A.* is not guilty. Coke P. C. p. 51.

A. challenges *C.* to meet in the field to fight, *C.* declines it as much as he can, but is threatened by *A.* to be posted for a coward, &c. if he meet not, and thereupon *A.* and *B.* his secord, and *C.* and *D.* his secound, meet and fight, and *C.* kills *A.* this is [453] murder in *C.* and *D.* his secound, and so ruled in P. 14 Jac. in Tawerner's case (*k*), tho *C.* unwillingly accepted the challenge.

But if it seems not to be murder in *B.* because tho he had malice against *C.* and *D.* his opponents, yet he had none against *A.* tho some have thought it to be murder also in *B.* because done by compact and agreement. 22 Eliz. 3. 262. sed *quare de hoc*.

If *A.* challenge *B.* to fight, *B.* declines the challenge, but lets *A.* know, that he will not be beaten, but will defend himself; if *B.* going about his occasions wears his sword, is assaulted by *A.* and kild, this is murder in *A.* but if *B.* had kild *A.* upon that assault, it had

(*i*) New Edit. cap. 145. p. 471.

(*k*) 2 Roll. Rep. 360. 3 Bul. 191.

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been *se defendendo*, if he could not otherwise escape, or bare homicide, if he could escape, and did not.

But if *B.* had only made this as a disguise to secure himself from the danger of the law, and purposely went to the place, where probably he might meet *A.* and there they fight, and he kills *A.* then it had been murder in *B.* but herein circumstances of the fact must guide the jury.

If *A.* and *B.* fall suddenly out, and they presently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and *A.* kills *B.* this is not murder but homicide, for it is but a continuance of the sudden falling out, and the blood was never cooled; but if there were deliberation, as that they meet the next day, nay, tho it were the same day, if there were such a competent distance of time, that in common presumption they had time of deliberation, then it is murder. *Co. P. C.* p. 51. *Jac. B. R. Ferrer's case*, M. 8 *Jac. B. R. Morgan's case*.

A. the son of *B.* and *C.* the son of *D.* fall out in the field and fight, *A.* is beaten, and runs home to his father all bloody, *B.* presently takes a staff, runs into the field, being three quarters of a mile distant, and strikes *C.* that he dies, this is not murder in *B.* because done in sudden heat and passion. *T. 9 Jac. B. R. 12 Co. Rep.* p. 87. (1).

[454] A boy came into *Osterly* park to steal wood, and seeing the Woodward climbs up a tree to hide himself, the Woodward bids him come down, he comes down, and the Woodward struck him twice, and then bound him to his horse-tail, and dragged him till his shoulder was broke, whereof he died; it was ruled murder, because, 1. The correction was excessive, and 2. It was an act of deliberate cruelty. *M. 4 Car. B. R. Holloway's case.* (m).

If the master designeth moderate correction to his servant, and accordingly useth it, and the servant by some misfortune dieth thereof, this is not murder, but *per infortunium*. *Cromp. 136. b. Dalt. cap. 96. p. 245. (n)*, because the law alloweth him to use moderate correction, and therefore the deliberate purpose therof is not *ex malitia præcogitata*.

But if the master designeth an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof, I see not how this can be excused from

(1) *Co. Jac. 296. Royley's case.*

(m) *Co. Car. 131. W. Jones 198. Kelly's*

127,

(n) *cap. 148. s. 478.*

murder;

murder, if done with deliberation and design, nor from manslaughter, if done hastily, passionately, and without deliberation; and herein consideration must be had of the manner of the provocation, the danger of the instrument, which the master useth, and the age or condition of the servant that is stricken, and the like of a school-master towards his scholar. (o).

The sheriff hath a warrant to hang a man for felony, and he beheads him, this is held murder, for it is an act of deliberation. *Cs. P. C.* p. 52.

A man hath the liberty of *Infangthiefe* (p), the steward of the court gives judgment of death against a prisoner against law, this was a cause of seizure of the liberty, but was not murder in the judge, *quia factum judicialiter, licet ignoranter*. *2 R.* 3. 10. a. the case of the steward of the liberty of the abbot of *Crowland*.

Blackf. Com. lib. iv. cap. 14. p. 194. See *Foster*, Disc. II. ch. 8. per tot. *1 Hawk. P. C.* ch. 31.

(o) See *Kelyng* 64, 65.

(p) See *Skelman's Glossary*, p. 313.

C H A P. XXXVII.

[455]

Concerning murder by malice implied presumptive, or malice in law.

I HAVE before distinguished malice implied into these kinds: 1. When the homicide is voluntarily committed without provocation. 2. When done upon an officer or minister of justice. 3. When done by a person, that intends a theft or burglary, &c.

I. Therefore touching the former of these.

When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious, and that he is *hostis humani generis*; it remains therefore to be inquired, what is such a provocation, as will take off the presumption of malice in him, that kills another.

He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder, the reason is, because it is an act of deliberation odious in law, and presumes malice.

If *A.* comes to *B.* and demands a debt of him, or comes to serve him with a *Subpæna ad respondendum* or *ad testificandum*, and *B.* thereupon kills *A.* this is murder, because it is no provocation.

Watts

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Watts came along by the shop of *Brains*, and distorted his mouth, and smiled at him, *Brains* kills him, it is murder, for it was no such provocation, as would abate the presumption of malice in the party killing. *M. 42 & 43 Eliz. B. R. Brain's case. (a)*

If *A.* be passing the street, and *B.* meeting him, (there being convenient distance between *A.* and the wall,) takes the wall of *A.* and thereupon *A.* kills him, this is murder; but if *B.* had justled *A.* this justling had been a provocation, and would have made it manslaughter, and so it would be, if *A.* riding on the road, *B.* had whipt the horse of *A.* out of the track, and then *A.* had alighted, and killed *B.* it had been manslaughter. *17 Car. 1. Lanore's case.*

[456] In the case of the lord *Morley*, *18 Car. 2. (b)* all the judges met, and it was agreed by all judges except one, that if *A.* gives slighting words to *B.*, and thereupon *B.* immediately kills him, this is murder in *B.* and that such words are not in law such a provocation, as will extenuate the offense into manslaughter, and the statute of *1 Jac. cap. 8.* of stabbing in such a case was but provisional, because the juries were apt upon any verbal provocation to find the fact to be manslaughter; but yet it was there held, that words of menace of bodily harm would come within the reason of such a provocation, as would make the offense to be but manslaughter.

And many, who were of opinion, that bare words of slighting, disdain, or contumely, would not of themselves make such a provocation, as to lessen the crime into manslaughter, yet were of this opinion, that if *A.* gives indecent language to *B.* and *B.* thereupon strikes *A.* but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.* that this is but manslaughter, for the second stroke made a new provocation, and so it was but a sudden falling out, and tho *B.* gave the first stroke, and after a blow received from *A.* *B.* gives him a mortal stroke, this is but manslaughter according to the proverb *the second blow makes the affray*; and this was the opinion of myself and some others.

There was a special verdict found at *Newgate*, viz. *A.* sitting drinking in an alehouse, *B.* a woman called him a *son of a whore*, *A.* takes up a broomstaff, and at a distance throws it at her, which hitting her upon the head kill'd her, whether this was murder or manslaughter was the question in *P. 26 Car. 2.* it was propounded to all the judges at *Serjeants-Inn*, two questions were named, 1. Whether bare words,

(a) *Cro. Eliz. 778. Ed. 131.*

(b) *Kelvng 55.*

or

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or words of this nature, would amount to such a provocation, as would extenuate the fact into manslaughter? (c)

2. Admitting it would not in case there had been a striking with such an instrument, as necessarily would have caused [457] death, as stabbing with a sword, or pistolling, yet whether this striking, that was so improbable to cause death, will not alter the case; the judges were not unanimous in it; and in respect, that the consequence of a resolution on either side was great, it was advised the king should be moved to pardon him; which was accordingly done.

A. and *B.* are at some difference, *A.* bids *B.* take a pin out of the sleeve of *A.* intending thereby to take an occasion to strike or wound *B.* which *B.* doth accordingly, and then *A.* strikes *B.* whereof he died; this was ruled murder, 1. Because it was no provocation, when he did it by the consent of *A.* 2. Because it appeared to be a malicious and deliberate artifice thereby to take occasion to kill *B.*

If there be chiding between husband and wife, and the husband strikes his wife thereupon with a pestle, that she dies presently, it is murder, and the chiding will not be a provocation to extenuate it to manslaughter. 43 *Eðz. Crompt. fol. 120. a.* (d)

II. The second kind of malice implied is, when a minister of justice, as a bailiff, constable, or watchman, &c. is killed in the execution of his office, in such a case it is murder.

If the sheriff's bailiff comes to execute a process, but hath not a lawful warrant, as if the name of the bailiff, plaintiff, or defendant be interlined or inserted after the sealing thereof by the bailiff himself, or any other, if such bailiff be killed, it is but manslaughter, and not murder.

But if a process issuing out of a court of record to a serjeant at mace, sheriff, or other minister, be erroneous, as if a *Copias* issue, when a *Difringas* should issue, yet the killing of such a minister in the execution of that process is murder, altho he executes the process in the night (e), or upon a *Sunday* (f). *Mackally's case, 9 Co. Rep. 68. a.*

(c) See *Kel. 131.*

(d) See also *Kel. 64.*

(e) 9 *Co. 66. a.*

(f) 9 *Co. 66. b.* for ministerial acts might lawfully be executed upon a *Sunday*, but since our author wrote, the law is altered in this respect; for by 29 *Car. 2. cap.*

7. all process, warrants, &c. served or executed on a *Sunday* are void, except in cases of treason, felony, or breach of the peace, so that now, an officer arresting a man upon a warrant on a *Sunday* is, as if he had him arrested without any warrant at all.

But

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But if the process be executed out of the jurisdiction of the court, the killing of the minister is only manslaughter, and so it is, if the issuing of the process were void, and *coram non judice*.

A bailiff or officer *jurus & conus* may arrest a man without shewing his warrant (*g*), and a private bailiff need not shew his warrant upon the arrest, till the party arrested demand it, and therefore, if the party arrested kills a bailiff upon the arrest without such a warrant shewn, it is murder, and so it is, if a serjeant at mace makes the arrest without shewing his mace, *ibidem Mackally's case*. (*h*)

A bailiff *jurus & conus* had a warrant to arrest *Pew* upon a *Capias*, and came to arrest him, not using any words of arrest, *Pew* said, *Stand off, I know you well enough, come at your peril*, the bailiff takes hold of him, *Pew* thrusts him through; it was ruled murder, tho he used no words of arrest, nor shewed his warrant, for possibly he had not time. *P. 6 Car. I. B. R. (i)*

A bailiff having a warrant to arrest *Cook* upon a *Capias ad satisfaciendum* came to *Cook's* house, and gave him notice; *Cook* menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest, *Cook* shoots him, and kills him; it was ruled, 1. That it is not murder, because he cannot break the house (*k*), otherwise it had been, if it had been upon an *Habere facias possessionem* (*l*). 2. But it was manslaughter, because he knew him to be a bailiff. But 3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. *P. 15. Car. B. R. (m)*

But if a sheriff enter the house by the outward door open, he or his [459] bailiff may break open the inward doors, tho the process be without a *Non omittas*, and therefore the killing of him in such case is murder. *M. 17 Jac. B. R. White and Wiltshire. (n)*

If the sheriff or bailiff have once laid hands upon the prisoner, and so began his execution, he may break open the outward doors to take him, *Sir William Fishe's case* (*o*), and if the warrant be directed to

(*g*) Tho the party do demand it; this is intended of the warrant constituting him bailiff; but as to the writ or process against the party, there is no difference between a public or a private bailiff, for in either case, if the party submit to the arrest, and do demand it, he is bound to shew at whose suit, for what cause, out of what court the process issues, and when and where return-

able. 5 Co. 54. a. 9 Co. 69. a;

(*b*) 9 Co. 69 a.

(*i*) Cro. Car. 183.

(*k*) 5 Co. 92. b. *Somayne's case*.

(*l*) 5 Co. 91. b.

(*m*) Cro. Car. 537. *W. Jones* 429.

(*n*) *Palmer* 52.

(*o*) Cited in *White's case*, *Palmer* 534.

five bailiffs, two or three may make execution; resolved in *White's case, ubi supra.*

Upon a warrant against a felon, or one that hath dangerously wounded another, or for surety of the peace, or good behaviour, the constable may break open the door where the offender is, *Dalt. cap. 78. (p.)*, and so may the sheriff or his bailiff upon a *Capias ut legatum, Capias pro fine*, or other process for the king, if not opened upon demand.

The constable of the vill of *A.* comes into the vill of *B.* to suppress some disorder, and in the tumult the constable is killed in the vill of *B.* this is only manslaughter, because he had no authority in *B.* as constable.

But it seems, that if the constable of the vill of *A.* had a particular precept from a justice of peace directed to him by name, or by the name of the constable of *A.* to suppress a riot in the vill of *B.* or to apprehend a person in the vill of *B.* for some misdemeanor, and within the jurisdiction and conusance of the justice of peace, and in pursuance of that warrant he go to arrest the party in *B.* and in execution of his warrant is killed in *B.* this is murder; for tho, in such case, it seems the constable was not bound to execute the warrant out of his jurisdiction, neither could he do it singly *virtute officii*, as constable of *A.* yet he may do it as bailiff or minister by virtue of the warrant, and the killing of him is murder, as well as if he had been constable of the hundred wherein *A.* and *B.* lie, or sheriff of the county; for a justice of peace may for a matter within his jurisdiction issue his warrant to a private person, as servant; but then such person must shew his warrant, or signify the contents of it. 14 H. 8. 16. a.

And alio the warrant of the justice be not in strictness [460] lawful, as if it express not the cause particularly enough, yet if the matter be within his jurisdiction as justice of peace, the killing of such officer in execution of his warrant is murder; for in such case the officer cannot dispute the validity of the warrant, if it be under seal of tie justice. 14 H. 8. 16.

If *A.* and *B.* are constables of the vill of *C.* and there happens a riot or quarrel between several persons, *A.* joins with one party, and commands the adverse party to keep the peace, *B.* joins with the other party, and in like manner commands the adverse party to keep the peace, and the assistants and party of *A.* in the tumult kill *B.* it

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seems that this is but manslaughter, and not murder, in as much as the officers and their assistants were one engaged against the other, and each had as much authority as the other.

But if the sheriff having a writ of *Habere facias possessionem* against the house and lands of A. and A. pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable is killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it is murder, because the constable had no authority to encounter the sheriff's proceeding or acting by virtue of the king's writ.

If a constable, or tithing-man, or watchman be in execution of his office, and be killed, it is murder; and in all cases of implied malice, or malice in law, the indictment need not be special, but general *ex malitia sua præcogitata interfecit & murdravit*, and the malice in law maintains the indictment. 9 Co. Rep. 63. *Mackally's case.*

But now touching the point of notice.

1. It is not necessary to make it murder, that the party killing know the person of the bailiff, constable, or watchman.

2. If he be a bailiff *jurus & conus*, it seems there is no necessity for him to notify himself to be such by express words, but it shall be presumed that the offender knew him, as it seems by the book 9 Co. Rep. 69. b. *Mackally's case; quære.*

3. But if it be a private bailiff, either the party must know [461] that he is so, as in *Pew's case* before, or there must be some such notification thereof, whereby the party may know it, as by saying, *I arrest you*, which is of itself sufficient notice, and it is at the peril of the party, if he kills him after these words, or words to that effect pronounced, for it is murder, if *de facto* it falls out, that he were a bailiff, and had a warrant. 9 Co. Rep. *ubi supra.*

4. A constable coming to appease a sudden affray in the day time in the village, whereof he is constable, it seems every man *et officio* is bound to take notice that he is the constable, because he's to be chosen and sworn in the leet, where all resiants are to attend 4 Co. Rep. 40. b. *Young's case (q);* but it is not so in the night-time, unless there be some notification, that he is the constable.

5. But whether it be in the day or night, it is sufficient notice, if he declares himself to be the constable, or commands the peace in the

(q) The reason here given by our author is not mentioned in this case, but it is there held, that a person's acting as constable is a

sufficient notification, altho the party do not otherwise know him to be so.

king's name, and the like for any that come in his assistance, or for a watchman, &c. and therefore, if any of them are killed after such a notification, it is murder in them that kill him. 9 Co. Rep. 68. b. *Mackally's case.*

And these differences may be collected out of the books, 4 Co. Rep. 40. *Young's case.* "Et en cest cas fuit tenuis per totam curiam, que si sur affray fait le constable & autres en son assistance veignont a suppresser le affray & a preserver le peace, & en fesant lour office le constable ou aucun de ses assistants soit tue, ceo est murder en ley, comment que le murderer ne scavoit le party, que fuit tue, & comment que le affray fuit sodein, pur ceo que le constable & ses assistants veigne per authoritie del ley pur le garder del peace & a preventer le danger, que poit ensuer per le infreinder de ceo, & pur ceo le ley adjudgera ceo murder, & que le murderer avoit malice prepense, pur ceo, que il oppose luy mesme enconter le justice del realme, & issint de le viscont, ou son bailiff, ou watchman en fesant [462] son office." And 9 Co. Rep. 69. *Mackally's case,* where it was objected, that the serjeant at mace did not shew his mace, whereby the offender might know him to be an officer; yet it was ruled, that the killing of him was murder, 1. Because it was found, that he was *serviens ad clavam, juratus & cognitus*, and a bailiff *jurus & conus* need not shew his warrant, tho demanded, nor another bailiff without demand; and when the books speak of a bailiff *jurus & conus*, it is not necessary that he be known to the party arrested, but it is sufficient if he be commonly known. 2. "Si notice fuit requisite il done sufficient notice, quant il dit *jeo soy arrest in le nosme le roy, &c.* Et le party a son peril doit luy obeyer, & sil nad loyall garrant, il poit aver son action de faux imprisonment, issint que in cest cas sans question le serjant ne besoigne a monstre son mace, car sils serra chase a monstre lour mace, ceo serra warning al party destro arrest a fuer.

H. 24 & 25 Car. 2. A great number of persons assembled in a house called *Siffinghurst* in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz. *A.* was known, the rest were not known; a warrant was obtain'd from a justice of peace to apprehend the said *A.* and divers other persons unknown, which were all together in *Siffinghurst-house*. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded en-

trance, and acquainted some of the persons within, that he was the constable, and came with the justice's warrant, and demanded *A.* with the rest of the offenders, that were then in the house, and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver *A.* or any of the malefactors, but going in commanded the rest of the company to stand to their staves: the constable and his assistants fearing mischief went away, and being about five rod from the door, *B. C. D. E. F. &c.* about fourteen in number, issued out and pursued the constable and his assistants; the constable commanded the peace, yet they fell on and killed one of the assistants of the constable, and wounded others, and then re-

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tired into the house to the rest of their company, which were in the house, whereof the said *A.* and one *G.* that read the warrant, were two, for which the said *A. B. C. D. E. F. G.* and divers others were indicted of murder, and tried at the king's bench bar, wherein these points were unanimously agreed.

1. That altho the indictment were, that *B.* gave the stroke, and the rest were present, aiding, and assisting, tho in truth *C.* gave the stroke, or that it did not appear upon the evidence, which of them gave the stroke, but only that it was given by one of the rioters, yet that evidence was sufficient to maintain the indictment, for in law it was the stroke of all that party, according to the resolution in *Mackally's case*, 9 Co. Rep. 67. b.

2. That in this case all, that were present and assisting to the rioters, were guilty of the death of the party slain, tho they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled this riot, were in law present, aiding, and assisting, and principals as well as those that issued out and actually committed the assault, for it was but within five rod of the house, and in view thereof, and all done as it were in the same instant; *vide lord Dacre's case before.*

4. That here was sufficient notice, that it was the constable before the man was killed, 1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, *viz.* that he came with the justice's warrant. 3. Because after his retreat, and before the man slain, the constable commanded the peace, and notwithstanding it, the rioters fell on, and killed the party.

5. It was resolved, that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That

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6. That those, that came in the assistance of the constable, tho not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That altho the constable retired with his company upon the not delivering up of *A.* yet the killing of the assistant of the constable in that retreat was murder. 1. Because it was one [464] continued act in the pursuance of his office, his retiring was as necessary, when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the same protection of the law, as his coming was. 2. Principally, because the constable in the beginning of the assault, and before the man was stricken, commanded the peace, and is all one with *Yonge's* case.

8. It seems, that tho the constable had not commanded the peace, yet when he and his company came about what the law allow'd them, and, when they could not effect it fairly, were going their way, that the rioters pursuing them, and killing one, was murder in them all, because it was done without provocation, for they were peaceably retiring; but this point was not stood upon, because there was enough upon the former point to convict the offenders, and in the conclusion the jury found nine of them guilty, and acquitted those within, not because they were absent, but because there was no clear evidence, that they consented to the assault, as the jury thought, and thereupon judgment was given against the nine to be hanged: and note, that the award was for the marshal to do execution, because they were remanded to the custody of the marshal, and he is the immediate officer of the court, and precedents in cases of judgment given in the king's bench have commonly run, *Et dictum est marescalli, &c. quod faciat executionem periculo incumbente.* (r)

At Newgate in Lent vacation, 26 Car. 2. the case was thus: five persons committed a robbery about Hounslow-heath in Middlesex, viz. *Jackson* and four others, the party robbed raised hue and cry, the country pursued them, and at Hampstead *Jackson* one of the five

(r) And thus it was in the case of the *Albion*, T. 9 Geo. I. B. R. who were convicted of a barbarous murder in Pembroke-shire, at Hereford assizes, being the next English county; the indictment was removed by *Certiorari* into the king's bench, in order to argue some exceptions, which were over-ruled; and after some question made, whether they ought not to be sent

back to Herefordshire to receive sentence there, the court was of opinion, that they had the same jurisdiction over facts committed in Wales, as if committed in the next adjacent county in England, and so they were sentenced at the king's bench, and were executed by the marshal at Kennington gallows near Southwark.

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turned upon his pursuers, the rest being in the same field, and having often resisted the pursuers, and refusing to yield, killed one of the pursuers, by five judges then present it was ruled. 1. That this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and in this case here was a felony done, and a felony done by those persons, that were thus pursued. 2. That also there was no warrant of a justice of peace to raise hue and cry, and tho there was no constable in the pursuit, yet the hue and cry was a good warrant in law for them to apprehend the offenders, and the killing of any of the pursuers by *Jackson* was murder. 3. In as much as all of the robbers were of a company, and made a common resistance, and so one animated the other, all those of the company of the robbers that were in the same field, tho at a distance from *Jackson*, were all principals, *viz.* present, aiding, and abetting. 4. That when one of the malefactors was apprehended a little before the party was hurt, *that person* being in custody when the stroke was given was not guilty, unless it could be proved, that after he was apprehended he had animated *Jackson* to kill the party: they had all judgment of death for the robbery, and four of them for the murder.

A press-master seized *B.* for a soldier, and with the assistance of *C.* laid hold on him. *D.* finding fault with the rudeness of *C.* there grew a quarrel between them, and *D.* killed *C.* By the advice of all the judges, except very few, it was ruled, that this was but manslaughter, 17 *Car.* 2. (f)

III. The third kind of *malice implied* is in relation to the person killing.

If *A.* comes to rob *B.* in his house, or upon the highway, or otherwise, without any precedent intention of killing him, yet if in the attempt, either without or upon the resistance of *B.* *A.* kills *B.* this is murder. *Co. P. C.* p. 52.

So if men come to steal deer in a park or forest, or to rob a warren of conies, and the parker, forester, or warrener resists and is killed, this is murder; the lord *Dacre's* case.

[466] If a prisoner dies by reason of dures and hard usage by the goaler, it is murder in the goaler. *Co. P. C.* p. 52.

So if a sheriff have a precept to hang a man for felony, and he beheads him, it is murder. *Co. P. C. Ibidem.*

(f) *Hugger's* case, 25 April 1666. at Newgate, *Kel.* 59, 137.

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To these may be added the cases abovementioned, *viz.* if *A.* by malice forethought strikes at *B.* and missing him strikes *C.* whereof he dies, tho he never bore any malice to *C.* yet it is murder, and the law transfers the malice to the party slain; the like of poisoning, *sed de his supra cap.*

See Foster. 138, 291, 292, 256, 257, 261, 262, 297, 298, 299, 300, 309, 310, 311, 314, 352, 371. See Index to 1 Hawk. P. C. Tit. Malice and Murder. Blackf. Com. Lib. iv. chap. 34. p. 198, 199, 200, 206.

C H A P. XXXVIII.

Of manslaughter, and particularly of manslaughter exempt from clergy, by the statute of 1 Jac. 8.

MANSLAUGHTER, or simple homicide, is the voluntary killing of another without malice express or implied, and differs not in substance of the fact from murder, but only differs in these ensuing circumstances.

1. In the degree of the offense, murder being aggravated with malice presumed or implied, but manslaughter not, and therefore in manslaughter there can be no accessories before. 2. In the form of the indictment, the former being always *felonicē ex malitiā præcogitatā interfecit & murdravit*, the latter only *felonicē interfecit*. 3. In the point of clergy, murder being by the statute of 23 H. 8. cap. 1. exempt from the benefit of clergy, but not manslaughter. 4. In the form of the pardon of murder, for tho at common law a pardon of all felonies had pardoned murder; yet by the statute of 13 R. 2. cap. 1. the pardon of murder must either be by the express word of *murder*, or else it must be a pardon of *felonica interfecatio* with a special *non obstante* of the statutes of 13 R. 2. H. 1 Jac. Lucas's [467]. case. (a)

But the pardon of manslaughter may be general by the words of *felonia* or *felonica interfecatio*, and hence it is, that if a man indicted of murder obtains a pardon of felony, or *felonica interfecatio* only, and be afterwards arraigned upon an indictment of murder, he must plead *quoad murdrum & interfecctionem ex malitiā præcogitatā* not guilty, and

(a) Moor, n. 1033. p. 752.

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as to the felony and interfection must plead his pardon; and then it the jury being charged to inquire of the plea of *not guilty*, find it to be only a simple felony and interfection without malice forethought, his pardon is to be allowd; and thus upon good deliberation it was done in the year 1668. at *Norwich*, Sir *Thomas Potte's* case, and is pursuant to the statute of 13 R. 2. which saith, "That before a pardon of felonies shall be allowed as to murder, it shall be inquired by good inquest, " if he were slain by await or malice prepended." And I remember very well in the case of *Rutaby*, T. 1653. who was indicted of murder in *Durham*, the defendant pleaded a pardon of *felonica interfectio*, and a general *non obstante* of all statutes; and the attorney general demurred; it was ruled, 1. That the pardon was insufficient with only a general *non obstante*, unless murder had been containd in the body of the pardon by express words. 2. But tho the party was so disallowd as to murder, yet the prisoner was remitted into *Durham* to be tried, whether guilty of murder, and being so found was executed; but had it been found only manslaughter, he should have been discharged, and altho his plea of the pardon to the indictment of murder was disallowd, yet it had stood good, if the conviction were of manslaughter: by the statute of 1 *Jac. cap. 8.* "Any person that shall stab or thrust any person, that hath not any weapon drawn, or hath not first stricken the party, that shall so stab or thrust, if the party die within six months, the offender is ousted of clergy, provided it shall not extend to him, that kills *se defensio*, or by misfortune, or in preserving the peace, or chastizing his child or servant.

[468] This act, tho but temporary, is continued till some other act of parliament shall be made touching the continuance or discontinuance thereof. 17 *Car. I. cap. 4.*

The use hath been in cases of this nature to prefer two indictments against offenders in this kind, *viz.* one of murder, another upon this statute, and put the prisoner to plead to both, and to charge the jury first with the indictments of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill, because, if convict upon either, the offender is ousted of clergy.

The indictment to put the prisoner from his clergy must be specially formed pursuant to the statute, *viz.* that he did with a sword, &c. stab the party dead, he having no weapon drawn, nor having struck first, otherwise it will be but a common manslaughter, and the party will have his clergy.

The

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The indictment need not conclude *contra formam statuti*, no more than in burglary or robbery, for the statute doth not make the offence to be felony, but ousts the prisoner of his clergy, where the crime is so circumstantiated as the statute expresseth; this was agreed in the case of *Page and Harwood*. *H. 23 Car. 1. B. R.* (b)

But yet it doth not vitiate the indictment, tho it do conclude, *Et sic interfecit contra formam statuti*, as was adjudged *Trin. 9 Jac. B. R. Bradley and Banks* (c); and accordingly for the most part to this day the indictments upon this statute do conclude *contra formam statuti*, so it is good with or without such conclusion, but it is best to follow the common usage, because every man doth not readily observe the reason of the omission of that conclusion.

In the case of *Page and Harwood*, *H. 23 Car. 1.* before cited, these points were resolved in the king's bench, viz.

1. That no man is ousted of his clergy by this statute, but he that actually stabs, and therefore those, that are laid in the indictment to be present, aiding, and abetting in such a case, shall be admitted to the benefit of clergy; and therefore, tho the indictment of such a manslaughter be specially formed upon the statute, and [469] concludes *contra formam statuti*, yet it is a good indictment of manslaughter against them that were present, aiding, and abetting, and therefore upon such a special indictment of manslaughter upon the statute, the prisoner may be convict of simple manslaughter, and acquitted of manslaughter upon the statute, and the indictment serves for a common manslaughter, as well as a man upon an indictment of murder may be acquitted of murder, and convict of manslaughter.

22 Martii, 14 Car. 1. At Newgate sessions *David Williams* was indicted specially upon this statute for the death of *Francis Marbury* (d), viz. *Quod felonice &c. unum malleum de ferro & ligno, anglice an hammer of wood and iron, è manu suâ dextrâ erga & ad anteriores partem capitis ipsius Francisci felonice violenter & in furore suo proiecit, & cum malleo praedicto ipsum Franciscum in & super anteriores partem capitis &c. percussit & pupigit, anglice did stab and thrust the said Marbury having no weapon drawn, nor struck first, whereof he presently died, & sic modo & formâ praedictâ interfecit &c. contra formam statuti &c.* The prisoner pleaded not guilty, and a special verdict was found, viz. that upon *St. David's* day the prisoner being

(b) In this case, as reported in *Styles* per *Bacon*.
86. it is not agreed to be so, on the contrary it was denied per *Roll*, and doubted

(c) *Cro. Jac. 283.*

(d) *W. Jones 432.*

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a *Welshman* had a leek in his hat, and there was at the same time in waggerly a *Jack-a-lent* in the street put up with a leek, and one *Nicholas Redman*, a porter, spake to the prisoner, and pointing to the *Jack-a-lent* said, *Look at your countryman*, and the prisoner being therewith enraged, threw an hammer at *Redman* to the intent feloniously to hit him, but missing him, the hammer did hit *Francis Marbury*, whereof he died, *& sic prædictus David præsumum Franciscum cum malleo prædicto pupigit & percuffit, anglice did stab and thrust,* the said *Francis* then not having any weapon drawn, nor then having first stricken the said *David*; and it was judged by *Bramston, Jones*, and the recorder *Gardiner*, that *Williams* was guilty of manslaughter at the common law, *sed non contra formam statuti*, so that it seems they thought not this to be a stabbing within the statute, being done with the throwing of the hammer, or at least they took this

[470] killing of *Marbury*, which was not at all intended by *Williams*, to be out of the statute, tho it excused him not for manslaughter at common law. (e)

The words of the statute are *stab or thrust*, if the stabbing or thrusting were with a sword, or with a pikestaff, it is within the statute, so it seems, if it be a shot with a pistol, or a blow with a sword or staff, yet *quære*, for *Jones* justice denied it.

In *M. 5 Jack.* it was ruled, that if the party slain had a cudgel in his hand, it is a weapon drawn within this statute, and the prisoner was admitted to his clergy at *Newgate*; but it seems it must be intended of such a cudgel, as might probably do hurt, not a small riding-rod or cane.

In the year 1657. (f) at *Newgate* before *Glynn*, who then sat as chief justice, a man was indicted upon this statute, and a special verdict found, that a bailiff having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, nor the man knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword, that hanged in his chamber, and stabbed the bailiff, whereof he presently died: there was some diversity

(e) Lord chief justice *Holt* in *Mowbridge's case*, *Kel. 131.* concurs with this judgment, for that it was not such a weapon or act, as is within the statute of stabbing; but he is of opinion, that *Williams* ought to have been found guilty of murder, if the indictment had been so laid, for that there was not a sufficient provocation to lessen the offense to manslaughter.

(f) *Quære*, whether the case here meant be not *Buckner's case*, *M. 1655.* reported in *Styles 467.* but that, as it is there reported, was not the case of a bailiff, but of a creditor, who stood at the door with a sword undrawn to keep the debtor in, till they could send for a bailiff, and was killed by the debtor.

of opinion among the judges, whether this were within the statute, but at length the prisoner was admitted to his clergy, for tho this case was within the words of the statute, and not within the particular exceptions, yet it was held, that this case was never intended in the statute, for the prisoner did not know, but that the party came in to rob or kill him, when he thus violently brake into his chamber without declaring his business. (3)

(2) See *Kel.* 136.

C H A P. XXXIX.

[471]

Touching involuntary homicide, and first of chance-medley or killing per infortunium.

INVOLUNTARY homicide is the death or hurt of the person of a man against or besides the will of him that kills him.

And in these cases, to speak once for all, the indictment itself must find the special matter, or in case the indictment be of murder or manslaughter, and upon the trial it appears to the jury it was involuntary, (as by misfortune, or in his own defense) the jury ought to find the special matter, and so conclude, *Et sic per infortunium, or se defendendo*, and not generally, that it was *per infortunium, or se defendendo*, because the court must judge upon the special matter, whether it be murder, homicide, or *per infortunium, or se defendendo*, and the jury is only to find the fact, and leave the judgment thereupon to the court; and in such case the prisoner must not plead the special matter, and so justify, but must plead not guilty, and the special matter must be found by the jury, *Stamf. P. C. Lib. I. cap. 7. fol. 15. a. Lib. III. cap. 9. fol. 165. a.* for upon the special matter found, the court may give judgment against the conclusion of the verdict, as that the fact is manslaughter, tho the conclusion of the verdict be *per infortunium, or se defendendo*. 44 E. 3. Coron. 94.

This involuntary homicide is of two kinds, *viz.* either 1. When it is purely involuntary or casual, as the killing of a man *per infortunium*, or 2. When it is partly involuntary, and partly voluntary, but occasioned by a necessity, that the law allows, which is commonly called homicide *ex necessitate*, as killing a man in his own defense, or the like; *de quibus postea.*

Homicide

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Homicide *per infortunium* is, where a man is doing a lawful act, and without intention of bodily harm to any person, and by that act death of another ensues, as if a man be shooting at buts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander. 21 H. 7. 28. a. 6 E. 4. 7. b.

Or if a carpenter or mason in building casually let fall a piece of timber or stone, and kills another. 21 H. 7. B. Coron. 69.

But if he voluntarily let it fall, whereby it kills another, if he gives not due warning to those that are under, it will be at least manslaughter; *quia debitam diligentiam non adhibuit*.

So if a man be felling a tree in his own ground, and it fall and kill a person, it is chance-medley. 6 E. 4. 7.

But in all these cases, if it doth only hurt a man by such an accident, it is nevertheless a trespass, and the person hurt shall recover his damages, for tho the chance excuse from felony, yet it excuseth not from trespass. 6 E. 4. 7.

Regularly he that voluntarily and knowingly intends hurt to the person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least; as if A. intends to beat B. but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen.

And therefore I have known it ruled, that if two men are playing at cudgels together, or wrestling by consent, if one with a blow or fall kill the other, it is manslaughter, and not *per infortunium*, tho Mr. Dalton, cap. 96. (a) seems to doubt it; and accordingly it was resolved P. 2 Car. 2. by all the judges upon a special verdict from Newgate, where two friends were playing at foils at a fencing school, one casually kild the other; resolved to be manslaughter.

Sir John Chichester, and his man-servant, whom he very well loved, were playing together, the man had a bedstaff in his hand, and Sir John had his rapier in the scabbard, Sir John, according to the usual sport between them, bids his man guard his thrust or pass, which he [473] was making at him with his rapier in the scabbard, the servant with the bedstaff brake the thrust, but withal struck off the chape of the scabbard, whereby the end of the rapier came out of the scabbard, but the thrust was not so effectually broken, but the end of the rapier prickt the servant in the groin, whereof he died:

(a) New Edit. cap. 148. p. 479.

Sir

Sir John Chichester was for this indicted of murder, and tried at the king's bench bar, where all this evidence was given; and it was ruled, 1. That it was not murder, tho the act itself was not lawful, because there was no malice or ill will between them. 2. That it was not barely chance-medley, or *per infortunium*, because altho the act, which occasioned the death, intended no harm, nor could it have done harm, if the chape had not been stricken off by the party kild, and tho the parties were in sport, yet the act itself, the thrusting at his servant, was unlawful, and consequently the death, that ensued thereupon, was manslaughter, and was accordingly found and adjudged, which I heard 23 Car. I. (b), 11 H. 7. 23. a. *Kelw.* 108, 136.

But if two play at barriers, or run a-tit without the king's commandment, and one kill the other, it is manslaughter; but if it be by the king's command, it is not felony, or at most *per infortunium*. 11 H. 7. 23. B. *Coron.* 229. *Dalton, cap.* 96. *Co. P. C.* p. 56. (c)

If A. comes into the wood of B. and pulls his hedges, or cut his wood, and B. beat him, whereof he dies, this is manslaughter, because, tho it was not lawful for A. to cut the wood, it was not lawful for B. to beat him, but either to bring him to a justice of peace, or punish him otherwise according to law.

But if a school-master correct his scholar, or a master his servant, or a parent his child, and by struggling, or otherwise, the child or scholar, or servant die, this is only *per infortunium*, [474] *Crompt. Just.* 28. b.

But this is to be understood, when it happens only upon moderate correction, for if the correction be with an unfit instrument (d), or too outrageous, then it is murder, as it happend in a case at *Norwich affizes 1670*. where the master struck a child, that was his apprentice, with a great staff, of which it died, it was ruled murder.

Several persons come to enter the house of A. as trespassers, A. shoots and kills one, this is manslaughter, otherwise it had been, if they had entered to commit a felony. *Crompt. de Pace*, fol. 29. a. *Harcourt's case.*

(b) *Aizys 12.* This seems a very hard case, and indeed the foundation of it fails, for the pushing with a sword in the scabbard by consent seems not to be an unlawful act, for it is not a dangerous weapon likely to occasion death, nor did it do so in this case but by an unforeseen accident, and therein differs from the case of justing, (or prize-fighting) wherein such weapons are made use of, as are fitted, and likely to

give mortal wounds.

(c) *Brooke*, after having taken notice of this as *Fineux's opinion*, says, That other justices in the time of *Henry VIII.* denied this, and held it felony to kill a man in justing, or sparring after that manner, notwithstanding the king's command, for such command is against law

(d) As with a bar of iron, or a sword, or a great cudgel, *Kel.* 64, 133.

But

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But in the case of *Levet* indicted for the death of *Frances Freeman*, the case was, That *William Levet* being in bed and asleep in the night in his house, his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the servant going to let out *Frances* thought she heard thieves breaking open the door, she therefore ran up speedily to her master, and informed him, that she thought thieves were breaking open the door, the master rising suddenly, and taking a rapier ran down suddenly, *Frances* hid herself in the buttery lest she should be discovered, *Levet's* wife spying *Frances* in the buttery, and not knowing her cried out, *Here they be that would undo us*: *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died: this was resolved to be neither murder, nor manslaughter, nor felony: *vide* the case cited by justice *Jones*, P. 15 Car. 1. B. R. and *Croke*, n. 1. (in *Cook's* case (e) for killing a bailiff, that broke a window to execute a *Capias*, which was judged to be manslaughter;) where the book says it was not felony, *quære* whether it be not homicide by misadventure, for the party kill'd was in truth no thief, tho' mistaken for one, and tho' it be not homicide voluntary, yet it seems to be *per infortunium*.

[475] If a man knowing that people are passing along the street throws a stone, or shoots an arrow over the house or wall with intent to do hurt to people, and one is thereby slain, this is murder, and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful; but if the man were tiling an house, and let fall a tile knowingly, and gave warning, and yet a person is kill'd, this is *per infortunium*, but if he gave not convenient warning, it is manslaughter, *quia non exhibuit debitam diligentiam*. (f)

If *A.* in his own park shoot at a deer, and the arrow glancing against a tree hits and kills *B.* this is homicide *per infortunium*, because it was lawful for him to shoot in his own park.

But if *A.* without the licence of *B.* hunts in the park of *B.* and his arrow glancing from a tree killeth a by-stander, to whom he intended no hurt, this is manslaughter, because the act was unlawful.

(e) *Cro. Car.* 538. *W. Jones* 429.

(f) This is upon supposition, that the bovine do not stand near an highway or place of resort, for then, tho' he should cry out first, it is manslaughter. See *Hull's case* 1664. *Kel.* 40.

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So if *A.* throws a stone at a bird, and the stone striketh and killeth another, to whom he intended no harm, it is *per infortunium*

But if he had thrown a stone to kill the poultry or cattle of *B.* and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful, but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.

By the statute of 33 H. 8. cap. 6. "No person not having lands, &c. of the yearly value of one hundred pounds *per annum* may keep or shoot in a gun upon pain of forfeiture of ten pounds." Suppose therefore such a person not qualified shoots with a gun at a bird, or at crows, and by mischance it kills a by-stander by the breaking of the gun, or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance medley in him, for tho the statute prohibits him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not inhanse the effect [476] beyond its nature.

A. having deer frequenting his corn-field out of the precinct of any forest or chace sets himself in the night-time to watch in a hedge, and sets *B.* his servant to watch in another corner of the field with a gun charged with bullets, giving him order to shoot, when he hears any bustle in the corn by the deer, the master himself improvidently rushes into the corn, the servant supposing it to be the deer shoots, and thereby kills his master in the night, this is neither petit treason, murder, nor manslaughter, but chance-medley, for the servant was misguided by his master's own direction, and was ignorant, that it was any thing else but the deer. This was my opinion in a case happening at Peterborough session; but it seemed to me, that if the master had not given such direction, that was the occasion of his mistake, it would have been manslaughter to have shot at a man, tho by mistaking it for the deer, because he did not *adhibere debitam diligentiam* to discover his mark, but shot directly at the person of a man, tho mistaking it for a deer.

A. drives his cart carelessly, and it runs over a child in the street, if *A.* have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart run over the child before it was possible for the carter to make a stop, it is *per infortunium*, and accordingly

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ingly this direction was given by us at Newgate sessions in 1672. and the carter convict of manslaughter.

If a man or boy riding in the street whip his horse to put him into speed, and run over a child and kill him, this is homicide, and *not per infortunium*, and if he had rid so in a press of people with intent to do hurt, and the horse had kild another, it had been murder in the rider.

But if a man or boy be riding in the street, and a by-stander whip the horse, whereby he runs away against the will of the rider, and in his course runs over and kills a child or man, it is chance-medley [477] only, and in that case the jury ought not to find him *not guilty* generally, but the special matter; but yet, because the coroner's inquest, which stood untraversed, had found the special matter, the court received the verdict of *not guilty* upon the indictment by the grand inquest of murder, and the party confessed the indictment by the coroner, and had his pardon of course, and this was said by Lee secondary to be the course at Newgate, 1 Sept. 16 Car. 2. Richard Pretty's cafe.

Tho the killing of another person *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, and therefore usually in such cases the verdict concludes, *quod interfecit per infortunium, & non per feloniam*, yet the party forfeits his goods, and tho he ought to have *quasi de jure* a pardon of course upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed till the next term of sessions to sue out his pardon of course, for tho it was not his crime, but his misfortune, yet because the king hath left his subject, and that men may be the more careful, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed, *ut supra*.

And so strict was the judicial law of the Jews in relation to the life of man, that even in this case the avenger of blood might kill the manlayer *per infortunium* before he got to the city of refuge, Deut. xix. 5, 6.

3 Wilson. 407, 408. Foster. 262, 263, 259, 280, 299. Keil. 40.

C H A P. XL.

Of manslaughter ex necessitate, and first se defendendo.

I COME to those homicides that are *ex necessitate*, and this necessity makes the homicide not simply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That necessity, which is of a private nature.
2. That necessity, which relates to the public justice and safety.

The former is that necessity, which obligeth a man to his own defense and safeguard; and this takes in these inquiries, 1. What may be done for the safeguard of a man's own life. 2. What may be done for the safeguard of the life of another. 3. What may be done for the safeguard of a man's goods. 4. What may be done for the safeguard of a man's house of habitation.

I. As touching the first of these, *viz.* homicide in defense of a man's own life, which is usually styled *se defendendo*.

It is generally to be observed, that in case of any indictment or charge of felony the prisoner cannot plead any thing by way of justification, as that he did it in his own defense, or *per infortunium*, but must plead *not guilty*; and upon his trial the special matter is to be found by the jury, and thereupon the court gives judgment.

Homicide *se defendendo* is of two kinds.

1. Such, as tho it excuseth from death, yet it excuseth not the forfeiture of goods, nor is the party to be absolutely discharged out of prison, but bailed, and to purchase his pardon of course.

2. Such as wholly acquits from all kinds of forfeiture.

First, therefore, of common homicide *se defendendo*.

Homicide *se defendendo* is the killing of another person [479] in the necessary defence of himself against him that assaults him.

In this case of homicide *se defendendo*, there are these circumstances observable.

1. It is not necessary that the party killed be the first aggressor or assailant, or of his party, tho commonly it holds.

There is a malice between *A.* and *B.* they appoint a time and place to fight, and meet accordingly, *A.* gives the first onset, *B.* retreats as far as he can with safety, and then kills *A.* who had otherwise

wife

wife killed him; this is murder, for they met by compact and design, and therefore neither shall have the advantage of what they themselves each of them created.

There is malice between *A.* and *B.* they meet casually, *A.* assauls *B.* and drives him to the wall, *B.* in his own defense kills *A.* this is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large, *Copston's case cited Crompt. de Pace 27. b. and Dalt. cap. 98. (a)*, for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of *A.*

A. assauls *B.* and *B.* presently thereupon strikes *A.* without flight, whereof *A.* dies, this is manslaughter in *B.* and not *se defendendo*, 43. *Affiz.* 31 but if *B.* strikes *A.* again, but not mortally, and blows pass between them, and at length *B.* retires to the wall, and being pressed upon by *A.* gives him a mortal wound, whereof *A.* dies, this is only homicide *se defendendo*, altho that *B.* had given divers other strokes, that were not mortal before he retired to the wall, or as far as he could. *Stamf. P. C. Lib. I. cap. 7. fol. 15. a. Dalt. cap. 98. Crompt. 28. a.*

But now suppose, that *A.* by malice makes a sudden assault upon *B.* who strikes again, and pursuing hard upon *A.* *A.* retreats to the wall, and in saving his own life kills *B.* some have held this to be murder, and not *se defendendo*, because *A.* gave the first assault, *Crompt. fol. 22. b.* grounding upon the book of 3 *E. 3. Itin. North-Coron.* 287. but Mr. *Dalton, ubi supra,* thinketh it to be *se defendendo (b.)*, tho *A.* made the first assault, either with or without malice, and then retreated; therefore the book of 3 *E. 3.*

(a) *New Edit. cap. 150. p. 484.*

(b) The case here referred to in *Dalton* is the case of an affray, (which is likewise the case put by *Stamford*) of this he says there was a difference of opinions, but delivers no opinion of his own; but as to the case here put by our author of a *malicious* assault, which he afterwards mentions, he seems plainly to be of the contrary opinion, and to think it murder; nor do I see anything in *Cores. 284. 287.* that could occasion any doubt about this matter, or any way relates to this case, for both those cases (which seem to be but one and the same) were of an affray, in which he that struck first, was the party killed, and the party killing struck not at all, till after he had fled as far as he could, and was necessitated

to do it in his own defense; so that the reason assigned by our author for demanding the question of the jury is grounded on a mistake; that, which to me seems the reason of putting that question to the jury, is this, the jury had found the fact specially, but had not drawn any general conclusion from it, the question was therefore asked, that they might make the usual conclusion, *unde dicunt quod prædictus A. (the defendant) se defendendo prædictum B. (the deceased) interfecit, & non per feloniam aut malitiam præcogitatam*, which was done accordingly; and therefore in the first of those places, *vix. Coron. 284.* the usual conclusion being inserted, no notice is taken of the question put to the jury.

Coron.

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Coron. 284, 287. which occasioned the doubt, is to be examined, which is thus.

It seems to me, that if *A.* did retreat to the wall upon a real intent to save his life, and then merely in his own defense killed *B.* that it is *se defendendo*, and with this agrees *Stamf. P. C. Lib. I. cap. 7. fol. 15. a.* But if on the other side *A.* knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defense, but really intended the killing of *B.* then it is murder, or manslaughter, as the circumstance of the case requires, and that was the reason, why the judges demanded of the jury 3 *E. 3.* whether he killed *B.* of malice, or otherwise to save himself, and when the jury answered, *It was to save his life,* he was remitted to prison to have his pardon of course, 3 *E. 3. Coron. 284. 287.*

2. In homicide *se defendendo*, there seems necessary some act to be done by the party killing, for if he be merely passive, this will make it only a killing *per infortunium*.

A. assaults *B.* who flies to the wall, or falls, holding his sword knife or pike in his hand, *A.* runs violently, or falls upon the knife of *B.* without any thrust or stroke offered at him by *B.* and thereupon dies, this is death *per infortunium*, and some have said, that in this case *A.* is *felo de se, de quo antea, vide Stamf. P. C. [481] Lib. I. cap. 7. p. 16. & libros ibi.*

3. Regularly it is necessary, that the person that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for tho' in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the laws own not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.

But this hath some exceptions.

1. In respect of the person killing.

If a gaoler be assaulted by his prisoner, or if the shetiff or his minister be assaulted in the execution of his office, he is not bound to give back to the wall; but if he kills the assailant, it is in law adjudged *se defendendo*, tho' he gives not back to the wall; the like of a constable or watchman, for they are ministers of justice, and under

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a more special protection in the execution of their office, than private persons. *Co. P. C. p. 56. 9 Co. Rep. 68. b. Mackally's case.*

But if the prisoner makes no resistance, but flies, yet the officer either for fear that he, or some other of his party will rescue the prisoner, strikes the prisoner, whereof he dies, this is murder, for here was no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.

And here is the difference between civil actions and felonies.

If a man be in danger of arrest by a *Capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he cannot be otherwise taken, if he be killed, it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods.

2. In relation to the person killed.

If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony. *Co. P. C. p. 56.*

3. In respect of the manner of the assault.

[482] If *A.* assaults *B.* so fiercely, that *B.* cannot save his life if he gives back, or if in the assault *B.* falls to the ground, whereby he cannot fly, in such case if *B.* kills *A.* it is *se defendendo*, *Co. P. C. p. 56.* but now here will be occasion to resume the former debate, where the first assailant may be said to kill the assailed *se defendendo*.

If *A.* assaults *B.* and *B.* thereupon reassaults *A.* and *A.* really flies to avoid the assault of *B.* who pursues him, and then *A.* being driven to the wall turns again and kills *B.* it seems this may be *se defendendo*, as hath been said; for it appears *de facto*, that *A.* fled from the assault of *B.* till he could fly no farther.

But if *A.* assaults *B.* first, and upon that assault *B.* re-assaults *A.* and that so fiercely, that *A.* cannot retreat to the wall or other *non ultra* without danger of his life, nay, tho' *A.* falls upon the ground upon the assault of *B.* and then kills *B.* this shall not be interpreted to be *se defendendo* (*c*), but to be murder, or simple homicide, according to the circumstances of the case, for otherwise we should

(c) Because his fall not being voluntary, faulted cannot safely quit the advantage he as a flight is, it does not appear, that he declined fighting, so that the party first af- has got.

have

have all cases of murders or manslaughters by way of interpretation turned into *se defendendo*.

The party assaulted indeed shall, by the favourable interpretation of the law, have the advantage of this necessity to be interpreted as a flight (*d*) to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favourable interpretation of the law, that *that* necessity, which he brought upon himself, should, by way of interpretation, be accounted a flight to save himself from the guilt of murder or manslaughter.

If *A.* after the assault, had really and *bond fide* fled from *B.* or that they had been parted by by-standers, that had [483] given a kind of interruption to the affray, and a declining of any farther affray by *B.* and therefore when *B.* pursues him to kill him, and *A.* after his flight, upon necessity of saving his life, kills *B.* this is apparent to be *se defendendo*; but when it is done altogether without any interval of flight or parting, and *B.* that was first assaulted, gains the present advantage by his strength, courage or fortune, to preclude the flight of *A.* and then *A.* kills him, this seems to be manslaughter, and not *se defendendo*.

And it must be observed, that the flight to gain the advantage of *se defendendo* to the party killing, must not be a feigned flight, or a flight to gain advantage of breath, or opportunity to fall on a fresh, as fighting cocks retire to gain advantage, but it must be a flight from the danger, as far as the party can, either by reason of some wall, ditch, company, or as the fierceness of the assailant will permit.

In Fleet street *A.* and *B.* were walking together, *B.* gave some provoking language to *A.* who thereupon gave *B.* a box on the ear, they closed *B.* was thrown down, and his arm broken, he ran to his brother's house presently, which was hard by, *C.* his brother, taking the alarm, came out with his sword drawn and made towards *A.* who retreated ten or twelve yards, *C.* pursued him, *A.* drew his sword and made a pass at *C.* and killed him; *A.* being indicted at Newgate sessions for murder, the court directed the jury upon the

(d) Not the law esteems this necessity to be a flight, but the party not having opportunity of flying, the law does not require it of him; but excuses him in the same manner, as if he had fled.

trial to find this manslaughter, not murder, because upon a sudden falling out; not *se defendendo*, partly because *A.* made the first breach of the peace by striking *B.* and partly because, unless he had fled as far as might be, it could not, by way of interpretation, be said to be in his own defense: and it appeared plainly upon the evidence, that he might have retreated out of danger, and his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon *C.* than to avoid him; and accordingly, at last, it was found manslaughter 1671. at *Newgate*.

[484] II. I come to the second consideration, namely, what the offense is, if a man kills another in the necessary saving of the life of a man assaulted by the party slain.

A. assaults the master, who flies as far as he can to avoid death, the servant kills *A.* in defense of his master; this is homicide *defendendo* of the master, and the servant shall have a pardon of course, 21 *H. 7.* 39. *a.* but if the master had not been driven to that extremity, it had been manslaughter at large in the servant, if he had no precedent malice in him. *Plowd. Com.* 100.

The like law had been for a master killing in the necessary defense of his servant, the husband in the defense of the wife, the wife, of the husband, the child of the parent, or the parent of the child, for the act of the assailant shall have the same construction in such cases, as the act of the party assisted should have had, if it had been done by himself, for they are in a mutual relation one to another.

If *A.* and *B.* and *C.* be of a company together, and walking in the field *C.* assaults *B.* who flies, *C.* pursues him, and is in danger to kill him, unless present help, *A.* thereupon kills *C.* in defense of the life of *B.* it seems that in this case of such an inevitable danger of the life of *B.* this occision of *C.* by *A.* is in nature of *se defendendo*, but then it must appear plainly by the circumstances of the case, as the manner of the assault, the weapon with which *C.* made the assault, &c. that the imminent danger of the life of *B.* be apparent and evident.

And the reason seems to be, because every man is bound to use all possible lawful means to prevent a felony, as well as to take the felon, and if he doth not, he is liable to a fine and imprisonment, therefore if *B.* and *C.* be at strife, *A.* a by-stander, is to use all lawful means that he may, without hazard of himself, to part them; and

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and the very relation of acquaintance, and mutual society between *A.* *B.* and *C.* seems to excuse the fact of *A.* in the necessary safeguard of the life of *B.* from the crime of simple homicide; *tamen quare.*

If *A.* be travelling, and *B.* comes to rob him, if *C.* falls into the company, he may kill *B.* in defense of *A.* and therefore much more, if he come to kill him, and such his intent be apparent, for in such case of a felony attempted, as well as of a felony [485] committed, every man is thus far an officer, that at least his killing of the attempter in case of necessity puts him in the condition of *se defendendo* in defending his neighbour; but of this more hereafter.

A. makes an assault upon *B.* a woman or maid with intent to ravish her, she kills him in the attempt, it is *se defendendo* because he intended to commit a felony. *Dalt. cap. 98. p. 250.*

And so it is if *C.* the husband or father of *B.* had killed him in the attempt, if it could not be otherwise prevented; but if it might be otherwise prevented, it is manslaughter; therefore circumstances must guide in that case.

III. I come to consider, what the offense is in killing him that takes the goods, or doth injury to the house or possession of another.

And herein there will be many diversities, as first, between a trespassing act and a felonious act, and between felonious acts themselves.

If *A.* pretending a title to the goods of *B.* takes them away from *B.* as a trespasser, *B.* may justify the beating of *A.* but if he beat him so that he dies, it is neither justifiable, nor within the privilege of *se defendendo*, but it is manslaughter. *Dalt. cap. 98. p. 251.*

A. is in possession of the house of *B.* *B.* endeavours to enter upon him, *A.* can neither justify the assault nor beating of *B.* for *B.* had the right of entry into the house, but if *A.* be in possession of a house, and *B.* as a trespasser enters without title upon him, *A.* may not beat him, but may gently lay his hands upon him to put him out, and if *B.* resists and assaults *A.* then *A.* may justify the beating of him, as of his own assault.

But if *A.* kills him in defense of his house, it is neither justifiable, nor within the privilege of *se defendendo*, for he entered only as a trespasser, and therefore it is at least common manslaughter: this was *Harcourt's case Crompt.* 27. a. who being in possession of a house

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by title, as it seems, *A.* eadeavoured to enter and shot an arrow at [485] them within the house, and *Harcourt* from within shot an arrow at those that would have entered, and killed one of the company, this was ruled manslaughter, 5 *Eliz.* and it was not *se defendendo*, because there was no danger of his life from them without.

But if *A.* had entered into the house, and *Harcourt* had gently laid his hands upon him to turn him out, and then *A.* had turned upon him, and assaulted him, and *Harcourt* had killed him, it had been *se defendendo*, and so it had been if *A.* had entered upon him, and assaulted him first, tho he intended not to kill him, yet if *Harcourt* had thereupon killed *A.* it had been only *se defendendo*, and not manslaughter, tho the entry of *A.* was not with intent to murder him, but only as a trespasser to gain the possession, 3 *E. 3. Coron. 35. Cromp. 27. b.* and it seems to me in such a case *Harcourt*, being in his own house, need not fly as far as he can, as in other cases of *se defendendo*, for he had the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight.

A. commits adultery with *B.* the wife of *C.* who comes up and takes them in the very act, and with a staff kills the adulterer upon the place ; this is manslaughter, and neither murder, nor under the privilege of *se defendendo* : but if *A.* had been taken by *C.* in the very attempt of a rape upon the wife, and she crying out, her husband had come and killed *A.* in the act of his ravishment, it had been within the privilege of *se defendendo*, because it was a felony ; the former case was adjudged manslaughter by the court, *B. R. M. 23. Car. 2. (d).*

Now concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point of *se defendendo*.

If a man come to take my goods as a trespasser, I may justify the beating of him in defense of my goods, as hath been said ; but if I kill him, it is manslaughter.

But if a man comes to rob me, or take my goods as a felon, and in my resistance of his attempt I kill him, it is *me defendendo* at least, and in some cases not so much.

(d) *Massing's case Raym. 212.*
When he was to be burnt in the hand, the court directed it to be done gently, because

they said there could not be a greater provocation.

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At common law, if a thief had assaulted a man to rob him, and he had kild the thief in the assault, it had been *se defendendo*, but yet he had forfeited his goods, as some have thought, 11 Co. Rep. 82. b. tho other books be to the contrary. 26 Affiz. 32.

But if *A.* had attempted a burglary upon the house of *B.* to the intent to steal, or to kill him, or had attempted to burn the house of *B.* if *B.* or any of his servants, or any within his house had shot and kild *A.* this had not been so much as felony, nor had he forfeited ought for it, for his house is his castle of defense, and therefore he may justify assembling persons for the safe-guard of his house. 21 H. 7. 39. a. 11 Co. Rep. 82. b. 5 Co. Rep. 91. b. 26 Affiz. 23. 3 E. 3. Coron. 330.

But otherwise it is, as hath been said, in case of a trespassing entry into the house claiming a title, and not to commit felony.

But now by the statute of 24 H. 8. cap. 5. "If any person attempts "any robbery or murder of any person in or near any common highway, cartway, horseway, or footway, or in their mansion houses, "or do attempt to break any mansion-house in the night-time, and "shall happen to be kild by any person or persons, &c. (tho a lodger "or servant) they shall upon their trial be acquitted and discharged in "like manner, as if he had been acquitted of the death of such person." P. 15 Car. 1. Cooper's case. (e)

This statute was to remove a doubt, and was declarative and enacting, and puts the killing of a robber in or near the highway, &c. in the same condition with one, that intends to rob or murder in the dwelling-house, and exempts both from forfeiture, and hath settled the doubt.

And upon this statute it was, that when there was malice between *A.* and *B.* and they had fought several times, and after met suddenly in the street near *Ludgate*, and *A.* said he would fight him, *B.* declined it, and fled to the wall, and called others to witness it, and *A.* pursued him, and struck him first, and *B.* in his own defense kild him, he was acquit from any forfeiture by the statute of 24 H. 8. cap. 5. 15 Eliz. Cromp. 27. b. Copston's case: but upon this statute [488] these things are observable.

1. It extends not to the case of a bare trespassing entry into a house, but only to such an entry or attempt as is intended to be for murder or robbery, &c. or some such felony, and therefore the cases of trespasses, either in houses or near highways, are left as before.

(e) Cro. Car. 544.

2. It seems, that it extends not to indemnify the killing of a felon, where the felony is not accompanied with force, for it speaks of *robbery*, therefore the killing of one that attempts to pick my pocket, is not within the act, for there is no such necessity; indeed, if any felon, after a felony committed, doth resist those, that endeavour to apprehend him, or fly, and be kild, this killing is no felony, but *that* is upon another account, for this statute hath relation only to killing before, or in the felony committed, not after.

3. It speaks only of breaking the house in the *night-time*, so that it seems it extends not to a breaking the house in the *day-time*, unless it be such a breaking, as imports, with it apparent robbery, or an intention, or attempt thereof.

4. Tho the statute speaks not of burning houses, yet he, that attempts the wilful burning of a house, and is kild in that attempt, is free from forfeiture, without the aid of this statute, as appears 26 *Affiz. 23.*

By the judicial law, *Exod. xxii. 2, 3. If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him, but if the sun be risen upon him, there shall blood be shed for him, for he should make restitution, and if he have nothing, he shall be sold for his theft:* and by the Roman law of the twelve tables, *Fur manifesta furta deprehensus, si aut, cum faceret furtum,nox esset, aut inter-diu se tenuit, cum deprehenderetur, defendetur, impune occideretur (f):* upon the latter of these laws the civilians and canonists have made many curious distinctions, *quas vide apud Covarruviam, Tom. I. Par. 3. de homicidio ad defensionem commisso (g);* and upon the former the Jewish Rabbies have made the like, *quas vide apud Selden de jure gentium.*

But as the laws of several nations, in relations to crimes and punishments differ, and yet may be excellently fitted to the exigencies and conveniences of every several state, so the laws of *England* are excellently fitted in this and most other matters to the conveniences of the *English* government, and full of excellent reason, and therefore I shall not trouble myself about other laws than those of *England.* (h).

(f) *Dig. Lib. IV. tit. 2. ad leg. Aquil. I. 4. §. 1. Agel. Lib. XI. c. p. 18. vide supra cap. 1. p. 3 & 6.*

(g) p. 561. Edit. Antwerp 1614.
(h) By the common law. *Qui latronem occidit nocturnum vel diurnum, non tenc-*

tur, si aliter periculum evadere non posset, tenet tamen, si posset. Brab. Lib. III. de corona, fol. 155. a.

Vide LL. Wibred. Edit. Wilk. p. 12. LL. Kne. I. 16. 20. 21. 35. LL. Ethesfani, l. 11. LL. Canuti, l. 59.

IV. There remains yet one other particular, namely, the killing a malefactor, that doth not yield himself to justice upon pursuit.

If a person be indicted of felony and flies, or being arrested by warrant or process of law upon such indictment escapes and flies, and will not render himself, whereupon the officer or minister cannot take him without killing of him, this is not felony, neither shall the killer forfeit his goods, or be driven to sue forth his pardon, but upon his arraignment shall plead *not guilty*, and accordingly it ought to be found by the jury. 3 E. 3. *Coron.* 288.

But if he may be taken without severity, it is at least manslaughter in him, that kills him, therefore the jury is to inquire, whether it were done of necessity or not. 22 *Affiz.* 55 *Stamf.* P. C. Lib. I. cap. 5. fol. 13. b.

And the same law it is, if *A.* commits felony and flies, or resists the people, that come to apprehend him, so that he cannot be taken without killing him, such killing is not felony, nor does the person, that did it, forfeit any thing, tho *A.* were not indicted, nor the person, that did it, had any warrant of any court of justice, for in such case the law makes every person an officer to apprehend a felon. 22 E 3. *Coron.* 261,

And the same law it is, if he be taken, and in bringing to the goal he breaks away, and the people of the vill pursue and cannot take him, unless they kill him, those, that kill him, upon their arraignment shall be acquitted of the felony, but yet the township [490] shall be amerced for the escape, and the person killed shall forfeit his goods upon the flight found. 3 E. 3. *Cor.* 328. 340. and by some it hath been held he shall forfeit the issue of his lands, till the year and day be past. 3 E. 3. *Coron.* 290.

If *A.* be suspected by *B.* to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arrest him by *B.* he resists and flies, whereby *B.* cannot take him without killing him, and *B.* kills him, if in truth there were no felony committed, or *B.* had not a probable cause to suspect him, this killing is at least manslaughter, but if there was a felony committed, and *B.* hath cause to suspect *A.* but in truth *A.* is not guilty of the fact, tho upon this account *B.* may justify the imprisonment of *A.* yet *quære*, if *B.* kills *A.* in the pursuit, whether this will excuse him from manslaughter.

But if a felony be committed, but not by *A.* but by some other, and *B.* hath a warrant from a justice of peace to apprehend *A.* or that

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that a hue and cry comes to *B.* the constable of *D.* to apprehend *A.* who endeavours to escape, or stands in resistance, so that he cannot be taken without killing him, it seems the killer is excused from felony, tho *A.* were not indicted; *vide pro hoc 3 E. 3. Coron. 289.* and the reason is because he is bound by law to execute his warrant, or pursue the party upon hue and cry and to apprehend him, and is indictable for a contempt if he doth not, and so it differs from the former case, for no man is bound to suspect another, but it is the act of his own judgment, and so he is merely his own warrant, and he may not adventure so far as the death of the party, unless he be sure he was the offender, tho he may imprison him, for thereupon he shall be brought to his trial; *sed de his vide Stampf. P. C. Lib. I. cap. 5. Crompt. fol. 30.*

And it is to be observed, that whether the party rescues himself after he is taken, and fly or resist, or whether he fly or resist before he is taking, and be kild in the pursuit, it is all one, the killer forfeits nothing, but the person kild forfeits his goods, tho he were kild before [491] attainder, upon an inquisition either by the coroner, or petit jury finding his flight. *3 E. 3. Coron. 288. 328.*

By the statute of 21 E. 1. *de malefactoribus in parcis,* if a parker, forester, or warden, finds any trespassers wandering in his park, forest, or warren, intending to do damage therein, and they will not yield to the forester after hue and cry made to stand to the king's peace, but fly or defend themselves, whereupon they are kild, the parker, forester, or warden, or their assistants shall not lose life or limb for the same, but shall enjoy the king's peace, so it be not done upon any former malice or evil will; but to make good such justification by a parker, forester, or warden, there are these things requisite: 1. It must be a legal forest, park, or warren, or chace, (for a chase includes warren) and not a bare warren, park, &c. in reputation, for if a man incloseth a piece of ground, and put deer or conies in it, this makes it not a park or warren without a prescription time out of mind, or the king's charter. 2. If a man hath a park within a forest, where he may hunt, and the forester kills the purloin-man, or his servant hunting in the purloin, this doth not excuse the forester from murder or manslaughter, as the circumstances of the case are. *Dyer 327. a.*

And note, that in all these cases of homicide by necessity, as in pursuit of a felon, in killing him that assaults to rob, or comes to burn

or

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or break a house, or the like, which are in themselves no felony, the matter may be specially presented by the grand inquest, (*quod vide 3 E. 3. Coron. 305. 289. and several other places,*) or by the coroner's inquest. And thus it was done in *Holme's case*, 26 *Eliz. Crompt.* 28. and in the case of a servant of justice *Croke*, who coming with the judge out of the circuit was assaulted in the highway, and he kild the assailant, and the matter presently was specially found by the coroner's inquest, whereby he was discharged by the statute of 24 *H. 8. cap. 5.* and in these cases upon this special presentment the party shall be presently discharged without being put to plead, but then this acquittal by presentment is no final discharge, for he may be indicted and arraigned again afterwards, if the matter of the former indictment be false; but if in such case the presentment of [492] the grand inquest or coroner's inquest be simply of murder or manslaughter, and thereupon he is arraigned and tried, and this special matter given in evidence, he shall be acquitted thereupon, for upon these special matters proved in evidence, he is not guilty, for it is no felony, and this acquittal is a perpetual discharge and bar against any other indictment for the same death; therefore this latter way is more advantageous in the conclusion for the party, than a special presentment. *Cromp. fol. 28. Holme's case.*

Foster. 271, 277, 318.

C H A P. XLI.

Concerning the forfeiture of him, that kills in his own defense, or per infortunium.

IF a man kill another by misfortune, yet he shall forfeit his goods in strictness of law, in respect of the great favour the law hath to the life of a man, and to the end that men should use all care, diligence and circumspection in all they do, that no such hurt ensue by their actions.

But if the occision or killing can by no means be attributed to the act of the person, but to the act of him, that is kild, there it seems, tho the instrument of the death is forfeited as a deodand, there follows no forfeiture of the goods of the person: for instance,

If

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If *A.* shoots at rovers, as he may lawfully do, if *B.* after the arrow is deliver'd runs into the place, where the arrow is to fall, of his own accord, and so is kill'd, this seems to be such an *infortunium*, that affects not the loss of goods, for it was not his act that contributed to the death of *B.* but the wilful or improvident act of *B.* himself; *quare.*

[493] If *A.* assaults *B.* and *B.* in his own defense kills *A.* yet *B.* forfeits his goods.

If the coroner's inquest find the killing specially *se defendendo*, yet the court shall arraign him, and try him, whether it were *se defendendo*, before he shall have his pardon of course. 4 *H.* 7. 1 & 2.

But if *B.* having a pitch-fork in his hand, *A.* assaults *B.* so fiercely, that he runs upon the pitch-fork of *B.* *B.* offering no thrust at all against *A.* (tho this be a very difficult matter of fact to suppose, yet if the fact be supposed to be so) it seemis *B.* forfeits no goods, because it was the act of *A.* himself, and some have said rather, that in that case *A.* is *felo de se*, and forfeits his goods, *de quo supra*, 44 *E.* 3. 44. *Coron.* 94. tho 3 *E.* 3. *Coron.* 286. saith his goods are forfeit in that case.

But where the killing of a man in his defense is in the law no felony, but the party upon his arraignment upon the special matter is to be found or judged simply not guilty, there is no forfeiture, but the party ought to be absolutely acquitted, unless he fled, and it be found, that *fugam fecit*, for *that* is a distinct forfeiture, altho the party be not guilty of the fact, and therefore always the jury is charged to inquire, whether the prisoner be guilty or not guilty, and if not guilty, whether he fled for the same, and if he fled, then to inquire also of his goods and chattles.

And the cases, where the prisoner is not to forfeit any goods or chattles, but is to be absolutely acquitted, if he kills in his own defense, are before remembered, and I here recollect them,

1. He that kills a thief, that attempts to rob him.
2. He that kills a person, that attempts to rob or kill him in or near the highway, or in the mansion of the killer, by the statute of 24 *H.* 8. cap. 5. and this, tho he hath not yet actually robbed, 3 *E.* 3. *Coron.* 330.

3. He that kills a person, that attempts wilfully to fire his house, or to commit burglary, tho he hath not actually broken or fired the house. 26 *Affiz.* 23. 29 *Affiz.* 23. if he came with that purpose.

4. An officer or bailiff, that in execution of his office kills a person, that assaults him, tho the officer gives not back to the wall, for the officer is under the protection of the law, and the books tell us it is not felony in such case. *Cœ. P. C.* p. 65.

5. The same law is of a constable, that commands the king's peace in an affray, and is resisted.

6. He that kills a felon, that resists, or *justicari se non permittit*, and the like of a constable or watchman, that is charged to take a person charged with felony, or attempts to take him upon hue and cry, if the person so charged resist or fly, and cannot be otherwife taken, tho perchance he be innocent, for the reason before given, and this either before or after the arrest.

7. If there be a great riot, or rebellious assembly, how far the killing of such persons in suppressing of them is criminal is to be seen.

By the statute 1 *Mar.* cap. 12. "If any persons to the number of twelve or more shall intend, practise, or put in ure to overthrow pales, hedges, ditches, or inclosures of parks or other grounds, banks of fish-ponds, conduit-heads, or pipes, or to pull down dove-cotes, barns, houses, mills, or burn stacks of corn, or abate rents or price of victual or corn, and being required by the justices of peace, sheriff of the county, mayors, bailiffs, or head officers of cities, by proclamation in the queen's name to retire to their homes, shall remain together one hour after such proclamation, or shall put in ure such things, they shall be adjudged felons.

"And if any persons above the number of two shall unlawfully assemble to put in ure the things aforesaid, that it shall be lawful for the sheriff, justices of peace, mayors, bailiffs, and every other person having commission from the queen to raise force in manner of war, to be arrayed to suppress and apprehend the rioters, and if the persons so unlawfully assembled after command and request by proclamation shall continue together, and not return to their habitations, and if any of them happen to be kild, maimed or hurt in or about the suppressing or taking them, the sheriff, justice, mayor, &c. and their assistants, shall be discharged [495] and unpunishable for the same against the queen and all other: this act was continued by the statute of 1 *Eli.* cap. 16. during her life. (a)

(a) In *Geo.* cap. 5. a new act was made to the same purport, which is perpetual.

And

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And it seems, as to this manner of killing rioters, that resist the ministers of justice in their apprehending, it is no other but what the common law allows, or at least what the statute of 13 H. 4. cap. 7. implicitly allows to two justices of the peace, with the sheriff or under-sheriff of the county, by giving them power to raise the *passe comitatus*, if need be, and to arrest the rioters, and they are under the penalty of 100*l.* if they neglect their duty herein.

And with this agrees Mr. Dalton, cap. 46. p. 115. (b), cap. 98. p. 249. (c), and *Crompt. de Pace* 62. b. "Nota, que viscount & justices de peace point prendre tants des homes in harneys, quant sont necessary & guns &c. & tuer les rioters, s'ils ne voilent eux rendre, come fut pris in case de *Drayton Bassett*, car le statute 13 H. 4. cap. 7. parle, qu'ils eux arrestant, & si les justices ou ascuns de leur company tue aucun des rioters, qe ne voil render nest offence in lui, come fut auxi prise in le dit case de *Drayton Bassett* (d);" and note, that tho the statute of 1 Eliz. was then in force, yet that was not a case within that statute, nor depending on it.

And it seems the same law is for the constable of a vill in case a riot happens within a vill, he may assemble force within his vill to arrest the rioters, and if he or those assembled in his assistance come to arrest the rioters, and they resist, and be kild by the constable or any of his assistants. the constable and his assistants are disipunishable for the same, for he is enabled hereunto by the common law, as being an officer for the preservation of the peace, and may command persons to his assistance, and if they refuse, they are fineable for it.

And farther, the statute of 17 R. 2. cap. 8. commands and [496] authorizes the king's ministers to use all their power to take and suppreſſ such riots and rioters, and a constable is the king's minister; and the statute of 13 H. 4. cap. 7. is no repeal of this statute, so that the killing of a rioter by a sheriff, justice of peace, or constable, when he will resist and not submit to the arrest, seems to be no felony at common law, nor makes any forfeiture, for they do but their office, and are punishable if they neglect it.

8. If the prisoners in gaol assault the gaoler, and he in his defense kills any of them, this is no felony, nor makes any forfeiture. 22 Affiz. 5. per Thorp, adjudge per tout le council.

(b) New Edit. cap. 182. p. 297.
(c) cap. 150. p. 481.

(d) See also *Crompt.* 23. b.

C H A P. XLII:

*Concerning the taking away of the life of man, by the course of law,
or in execution of justice.*

THIS kind of occision of a man according to the laws of the kingdom and in execution thereof ought not to be numbered in the rank of crimes, for it is the execution of justice, without which there were no living, and murders, burglaries, and all capital crimes would be as frequent and common, as petit trespasses and batteries.

The taking away of the life, therefore, of a malefactor according to law by sentence of the judge, and by the sheriff or other minister of justice pursuant to such sentence, is not only an act of necessity, but of duty, not only excusable, but commendable, where the law requires it.

But because there are some cautions and considerations in this matter, I have added it to the close of this title of [497] homicide.

Regularly it is not lawful for any man to take away the life of another, tho a great malefactor, without evident necessity, (whereof before,) or without due process of law, for the deliberate, uncom-pelled extrajudicial killing of a person attaint of treason, felony, or murder, or in a *præmunire*, tho upon the score of their being such, is murder. (a)

Therefore it is necessary, 1. That he, that gives sentence of death against a malefactor, be authorized by lawful commission or charter, or b y prescription to have cognizance of the cause. 2. That he that executes such sentence be authorized to make such execution, otherwise it will be murder or manslaughter, or at least a great misprision in the judge that sentenceth, or in the minister that executeth.

I. As touching the authority of the judge, I shall not at large dis-course the jurisdiction of the judges or courts in this place; it will be more proper hereafter ; but shall mention only some things, that may be seasonable for this place.

If he that gives judgment of death against a person, hath no com-mission at all, if sentence of death be commanded to be executed by

(a) Cor. 203.

such

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such person, and it is executed accordingly, it is murder in him that commands it to be executed, for it was *coram non judice*.

If a commission of the peace issue, this extends not to treason, neither can justices of peace hear and determine all treasons by force of this commission, for it extends only to felonies, (tho some treasons are by act of parliament limited to their cognizance, as hath been before observed) if they take an indictment of treason, and try and give judgment upon the party, this is most certainly erroneous, and possibly avoidable by plea, but I do not think it makes the justices guilty of murder in commanding the execution of such sentence, for they were not without some colour of proceeding therein, because all treason is felony, tho it be more, and the king may, if he pleases, proceed against a traitor for felony; and antiently a pardon [498] of all felonies discharged some treasons. 1 E 3. *Charter de Pardon* 13. 22 *Affiz.* 49. Co. P. C. p. 15. but it is a great misprision in such justices.

The justices of the common pleas cannot hold plea upon an indictment or appeal in capital causes, it will be at least erroneous, if not voidable by plea; but if they hold plea in appeal of death by writ, and give judgment therein for the party to be hanged, which is executed accordingly, I think it is an error, and a great misprision in them, but not felony, because they had colour to hold plea thereof by an original writ out of the chancery under the great seal.

Upon the same reason I take it, that if there be a writ sent to the sheriff, eschotor, or *A. B.* and *C.* to hear and determine felonies, whereas it ought to be a commission, 42 *Affiz.* 12, 13. and they proceed thereupon to a judgment and execution in case of felony, it is a great misprision, but I think it makes not the judge nor executioner guilty of murder; the same law I take to be in *Lacie's* case, *quod vide Co. P. C. p. 48. 5 Co. Rep. 106. a Constable's* case. The commissioners upon the statute of 28 *H. 8.* had given judgment of death against him that struck at sea, and the party died at land; and the same law I take to be, where he that hath the franchise of *Infangthief*, gives judgment of death against a felon not within his jurisdiction. 2 *R. 3. 10. b.* the case of the abbot of *Crowland*; it might be a cause of a seizure of the liberty, but makes not the steward guilty of murder.

And what I have said of a proceeding in capitals without the strict extent of their commission may be said of the like proceeding, where, in strictness of law, the commission happens to be determined.

A commission

A commission of gaol-delivery issues to *A. B. &c.* they sit one day, and forget to adjourn their commission, or the clerk forgets to enter the adjournment, a felony is committed the next day, and they proceed in sessions, and take an indictment, and give judgment of death against the malefactor, this judgment is erroneous, and the clerk of assizes shall never be permitted to amend the record, and enter an adjournment, this judgment is erroneous, and shall be reversed; but it makes not the judges guilty of murder or homicide, tho in strictness of law their commission was determined by the first [499] day's session without adjournment.

King *James* issued out several commissions of gaol-delivery, &c. the justices went their circuit, the king died, yet they proceeded, and before notice of the king's death condemned and executed many prisoners; it is held these proceedings were good, and the commissions stood till notice of the king's death, *M. 3 Car. C. B.* Sir *Randolph Crew's case (b)*, tho, in strictness of law, their commissions were determined by the king's death; but suppose they were both in law and fact determined, the judgments that happened upon sessions begun after the king's death would be erroneous, but the judges had not been criminal in commanding the execution of their sentence before notice; for if *ignorantia juris* doth in some cases excuse a judge, much more doth *ignorantia facti*.

If a commission of gaol-delivery issue to *A. B.* and *C.* in the county of *D.* and afterward a second commission of gaol-delivery in the same county issue to *E. F.* and *G.* and there is notice given to the former commissioners, but no session by virtue of the second commission, whereupon the former proceed notwithstanding that notice *in pays*, (as conceiving it insufficient, unless either a writ of *Supersedeas* had been sent them, or at least a session by the second commission) and they proceed in cases capital, this makes them not guilty of felony, *34 Affiz. 8.* because tho the second commission be effectual for them to proceed without any actual revocation by *Supersedeas*, or otherwise of the former, yet the former is not actually determined, till a *Supersedeas* or a session by virtue of the second commission, upon an extrajudicial notice, or a notice *in pays*, the first commissioners may, if they please, forbear any further session, but they are not bound to take notice of rumours and reports; the like in case of a sheriff, *M. 26 Eliz. Moore 333. 5 E. 4.*

b) Cro. Car. 98.

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If

If in the time of peace a commission issue to exercise martial law, and such commissioners condemn any of the king's subjects (not being listed under the military power), this is without all question [500] a great misprision, and an erroneous proceeding, and accordingly adjudged in parliament in the case of the earl of *Lancaster*, *Parl. 1 E. 3. part 1. de quo supra*, p. 344.

And in that case the exercise of martial law in point of death in time of peace is declared murder. *Co. P. C.* p. 52.

But suppose they be listed under a general or lieutenant of the king's appointment under the great seal, and modelled into the form and discipline of an army, either in garrison or without, yet as long as it is *tempus pacis* in this kingdom, they cannot be proceeded against as to loss of life by martial law; and the same for mariners that are within the body of the kingdom, but their misdemeanors, at least if capital, are to be punished according to the settled laws of the kingdom, 3 *Car. cap. 1.* the petition of right; yea, and it seems as to mariners and soldiers at sea, when in actual service in the king's ships, they ought not to be put to death by martial law, unless it be actually in time of hostility; and this appears by the statute of 28 *H. 8.* that settled a commission to proceed criminally in cases of treason and felony, and by the late act of 13 *Car. 2. cap. 9.* settling special orders under pain of death by act of parliament (*c.*); but indeed, for crimes committed upon the high sea, the admiral had at common law a jurisdiction even unto death, *secundum leges maritimas*; but this was a different thing from martial law.

And this appears also by the statute of 13 *R. 2. cap. 2.* the constable and marshal, who are the *judices ordinarii* in cases belonging to the martial law, are yet thereby declared to have no jurisdiction within the realm, but of things that touch war, which cannot be discussed nor determined by the common law.

It must therefore be a time of war, that must give exercise to their jurisdictions, at least in cases of life.

And thus far concerning the judicial sentence of death, where and when it is homicide criminally, and when not.

II. Now a few words concerning the officer executing such sentence, and where and when he is culpable in so doing.

(c) And this appears also from the annual statutes for punishing mutiny or de-

fection, 3 *Geo. 3. cap. 2. &c. mados alio.*

Wheresoever

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Wheresoever the Judge hath jurisdiction of the cause, the officer executing his sentence is not culpable, tho the judge err in his judgment, but if the judge have no manner of jurisdiction in the cause, the officer is not altogether excusable, if he execute the sentence.

In the great courts of justice, as of *oyer* and *terminer*, gaol-delivery, and of the peace, regularly, the sheriff of the county, or those that he substitutes, as under-sheriff, gaoler, or executioner, are the ordinary ministers in execution of malefactors, and they are to pursue the sentence of the court, and therefore, 1. If he vary from the judgment, as where the judgment is to be hanged, if he behead the party, it is held murder (*d*). 2. It must be done by the proper officer, *viz.* the sheriff or his substitute, if another doth it of his own head, it is held murdet: *vide Co. P. C. p. 52.*

The use heretofore was, and regularly should be so still, that if sentence of death be given by the lord high steward, a warrant under the seal of the lord steward, and in his name should issue for the execution, and the like by three at least of the commissioners of *oyer* and *terminer*, where sentence of death is given by them. *Co. P. C. p. 31.*

But use hath obtain'd otherwise before commissioners of goal-delivery, for there is no warrant under the seal of the justices for execution, but only a brief abstract or calendar left with the sheriff or gaoler; and I remember Mr Justice *Rolle* would never subscribe a calendar, but after judgment given would command the sheriff in court to do execution, and for not doing it, he fined *Varney* the sheriff of *Warwickshire* 2000*l.*

If a prisoner be removed into the king's bench by *Habeas Corpus*, or taken upon an indictment of felony in *Middlesex*, [502] and be committed to the marshal, and upon his arraignment be found guilty, and hath judgment to die, the court may send the person to *Newgate*, and command the sheriff of *Middlesex* to do execution, but

(d) Of this opinion was also lord *Coke*, *Co. P. C. p. 52. 211.* notwithstanding it had been practised otherwise in some instances, as in the case of queen *Ann Boleyn*, and queen *Katherine Howard*, in the time of *Henry VIII.* the duke of *Somerset* in the time of *Edward VI.* and the lord *Audley* in the time of *Charles I.* upon the authority of which cases the lady *Alice Lister* was beheaded for treason 1 *Jac. II.* See *State Tr. Vol. IV. p. 129.*

So in the cases of *Ayton*, 19 *Jan. 1690.* at the *Old Bailey*, (*State Tr. Vol. IV. p. 483.*) and *Matthews* the printer, *Odo. 30, 1719.*

at the *Old-Baily*, who were both sentenced for high treason, and were hanged till they were dead, without any quartering or beheading, altho this was not only different from, but contrary to the sentence in high treason, which orders, that they shall be hanged, but not till they are dead: but as lord *Coke* says in the place above-mentioned, *Judicandum est legibus non exemplis;* and indeed, since the judgment is the warrant for the execution, it should seem that every execution, which is not pursuant to the judgment, is unwarrantable.

if he be remitted to the marshal, (as regularly he ought to be,) then the marshal is the proper officer of the court to do execution, and he may execute the offender in *Middlesex*, where-ever the offense was committed (*e*), and the court may *ore tenus*, or by their order, command the sheriff of *Middlesex* to be affliting, but the entry upon the roll ought to be, *Et præceptum est marescallo, &c. quod faciat executionem periculo incumbente*; and thus it was done *H. 24 Car. 2.* upon a conviction of murder committed in *Kent* upon a trial at the king's bench bar, upon search and producing of many antient and late precedents, for regularly, he that is the immediate minister of the court, ought to make execution, and such is the marshal to the court of king's bench, especially where the persons are committed to his custody, and this is done without any writ, but only by the command of the court *ore tenus*.

And thus far concerning the death or killing of a man, where it is not, and where it is punishable, and the several degrees thereof.

(*e*) See *Altboe's case supra in notis p. 464.* who were executed in *Surrey* for a fact committed in *Pembrokehire* in *Wales*; see also the case of *Fitz-Patrick and Bradway, State Tr. Vol. I. p. 374*, who were execu-

ted in *Middlesex* for a fact in *Wilshire*, and the case of *Laver, State Tr. Vol. VI. p. 332.* who was executed in *Middlesex* for a fact in *Essex*.

Foster, 267.

Of larciny, and its kinds.

ALTHIO the offenses of burglary and arson are of an higher nature than larciny, yet because there be some things that fall under the consideration of larciny, that are necessary to be known previously to the consideration of burglary, &c. I shall begin with this.

Larciny or theft, under the various laws of several countries, hath been under various degrees of punishment: in some countries the punishment was triple or fourfold restitution, as among the *Jews* (*a*), in others deportation or banishment, or condemning to several employments, as among the *Romans*. (*b*)

(*a*) *Vide supra p. 9.*

(*b*) *Vide supra p. 11.*

And

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And in *England*, in antient time, the punishment of theft was not fixed or settled, and altho *Hoveden* and *Simon Dunelmensis* tells us, that *firmissimā lege statuit Henricus primus, quod fures latrocinio deprehensi suspendantur*; yet in the time of *Henry II.* they were otherwise punished; *quod vide apud Selden. Jur. Ang. p. 83.* But the same law, touching the punishment of grand larciny with death, seems to have been fixed and settled ever since the time of *Henry II.* and *Braeton*, that wrote in the time of *Henry III.* takes it as a thing settled and commonly practised in his time: *vide ipsum. Lib. III. cap. 32. p. 151. b. (*)*

Now touching the kinds of larcinies they are two, *viz.* either simple larciny, or larciny accompanied with violence or putting in fear, which is called robbery.

Simple larciny or theft is of two kinds, *viz.*

Grand larciny, when it is above the value of twelve-pence.

Petit larciny, when only of the value of twelve-pence, or under.

The nature of the offense is the same in both, but the degrees of their punishment differ, as shall be said.

And therefore what is said concerning grand larciny here is [504] applicable to petitlarciny, except as to the point of punishment, for the punishment of grand larciny is death and loss of goods, the punishment of petit larciny is loss of goods and whipping, but not death.

Simple larciny is defined by *Braeton (c)* and *Britton (d)* to be *fraudulenta contractatio rei alienæ cum animo furandi invito domino, cuius res illa fuerit*: by my lord *Coke* to be the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night, in the house of the owner. *Ca. P. C. p. 107.*

I shall pursue his method in that chapter with such additions as shall be requisite.

The indictment runs *vi & armis felonice furatus fuit, cepit & aportavit* in case of dead chattles, *cepit & abduxit* in case of a horse, *cepit & effugavit* in case of sheep, cows, &c. wherein the words *felonice furatus fuit, cepit*, are essential to the crime.

This description gives us these heads of inquiry.

1. What a taking.
2. What a carrying away.
3. What a felonious taking and carrying away.
4. What the personal goods.
5. What the goods of another,
6. What or who may be said a taker.

(*) *Vide supra p. 12. Et notas ibidem,* (d) *cap. 15. p. 22. See also Flota, Lib. I;*
{c} Lib. III, de corona, cap. 32. fol. 150. b. cap. 38. p. 44.

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These regularly are the ingredients into this crime of felony, and must be severally considered.

I. What shall be said a taking,

If *A.* delivers a horse to *B.* to ride to *D.* and return, and he rides away *animo furandi*, this is no felony; the like of other goods (*e*). *Co. P. C.* p. 107. 28 *Eliz. Butler's case.*

So if a man deliver goods to a carrier to carry to *Dover*, he carries them away, it is no felony; but if the carrier have a bale or [505] trunk with goods deliverd to him, and he break the bale or trunk, and take and carry away the goods *animo furandi*, or if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking by the book of 13 *E. 4* 9. *Co. P. C.* p. 107.

But that must be intended, when he carries them to the place, and delivers or lays them down, for then his possession by the first delivery is determined, and the taking afterwards is a new taking: *wid. 21 H. 7. 14.*

Before the statutē of 21 *H. 8. cap. 7.* if a man had deliverd goods to his servant to keep or carry for him, and he carrieth them away *animo furandi*, this had not been felony (*f*), but by that statute it is made felony, if of the value of forty shillings; but the offender shall at this day have his clergy (*g*); but yet if an apprentice (*h*) doth this, or if a man deliver a bond to his servant to receive money, or deliver him goods to sell, and he accordingly sells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by this statute. *Co. P. C.* p. 105. 26 *H. 8. Dy. 5. a. b.*

A. a servant of *B.* receives the rents of *B.* and *animo furandi* carries it away, this is not felony at common law, because *A.* had it by delivery; nor by the statute, because he had it not by the delivery of his master or mistress. *Dalt. cap. 102. (i)*

(e) Upon this principle it was doubted, whether a person hiring lodgings was guilty of felony in stealing the goods he had hired with his lodgings. See *Kel. 24 & 81.* but this doubt is removed by 3 & 4 *W. & M. cap. 9.* whereby it is declared to be felony.

(f) This was a disputed point (see 3 *H. 7. 12. b.*) for which reason the statute of 21 *H. 8. cap. 7.* was made to settle the doubt that was at common law; for in the before-mentioned case, 21 *H. 7. 14.* it is said to be felony, if he was intrusted with the keeping only within the house, stable, &c. because then the things are adjudged in the

master's possession; but if he be intrusted to carry the things out of the house, &c. elsewhere, then it is not felony.

(g) By 27 *H. 8 cap. 17.* Clergy was taken away, restored again by 1 *E. 6. cap. 12.* and again taken away by 12 *A. & R. cap. 7.* from offences committed in any dwelling-house or out-house, excepting in the case of apprentices under the age of fifteen years.

(h) The statute also excepts all servants within the age of eighteen years, this act which was repeal'd by the general words of 1 *Mar. cap. 1.* is revived by 5 *Eliz. cap. 10.*

(i) *New Edit. cap. 155. p. 496.*

A. delivers

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If A. delivers the key of his chamber to B. who unlocks the chamber, and takes the goods of A. *animo furandi*, this is felony, because the goods were not deliver'd to him, but taken by him. 13 E. 4. 9. b.

He, that hath the care of another's goods hath not the possession of them, and therefore may, by his felonious embezzling of them, be guilty of felony; as the butler that hath the charge of the master's plate; the shepherd that hath the charge of his master's sheep. 3 H. 7. 12. b. 21 H. 7. 15. a. Co. P. C. p. 108.

The like law for him that takes a piece of plate set before him to drink in a tavern, &c. for he hath only a liberty to use, not a possession by delivery. 13 E. 4. 9.

And so it is of an apprentice, that feloniously embezzels his master's goods or money out of his shop, it is felony. *Dalt. cap. 102.*

If A. comes to B. and by a false message or token receives money of him, and carries it away, it is no felony, but a cheat punishable by indictment at common law, or upon the statute of 33 H. 8. cap. 1. by setting in the pillory.

If A. finds the purse of B. in the highway, and takes it and carries it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony; the like, in case of taking of a wreck or *treasure-trove*. 22. *Affiz. 99.* or a waif or stray.

But yet this taking of *treasure-trove*, waif, or stray must be where the party that takes them, really believes them to be such, and colour's not a felonious taking under such a pretense, for then every felon would cover his felony with that pretense.

Where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them *animo furandi*, it is felony, and the pretense of finding must not excuse.

If a man's horse be going in his ground, or upon his common, and he takes it *animo furandi*, it is no finding, but a felony.

So it is if the horse stray into a neighbour's ground or common, it is felony in him that so takes him; but if the owner of the ground takes it *damage feasant*, or the lord seizes it as a stray, tho' perchance he hath no title so to do, this is not *felloe animo*, and therefore cannot be felony.

If the sheep of A. stray from the flock of A. into the flock of B. and B. drives them along with his flock, or by pure mistake shears him, this is not a felony, but if he know it to be another's, and mark it with his marks, this is an evidence of a felony.

A man hides a purse of money in his corn-mow, his servant finding it took part of it, if by circumstances it can appear he knew his master laid it there, it is felony; but then the circumstances must be pregnant, otherwise it may be reasonably interpreted to be a bare finding, because an unusual place for such a *depositum*.

A. hath a design to steal the horse of *B.* enters a plaint of replevin in the sheriff's court for the horse, and gets him deliver'd to him, and then rides him away; this is taking and stealing, because done *in fraudem legis* (k) *P. 15 Eliz. B. R. Co. P. C. p. 108.*

A. hath a mind to get the goods of *B.* into his possession, privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession, and takes the goods, if it were *anima furandi*, it is larceny.

If *A.* steals the horse of *B.* and afterwards delivers it to *C.* who was no party to the first stealing, and *C.* rides away with it *anima furandi*, yet *C.* is no felon to *B.* because tho' the horse was stolen from *B.* yet it was stole by *A.* and not by *C.* for *C. non cepit*, neither is he a felon to *A.* for he had it by his delivery.

But if *A.* steals the horse of *B.* and after *C.* steals the same horse from *A.* in this case *C.* is a felon both as to *A.* and as to *B.* for by the theft by *A.* *B.* lost not the property, nor, in law, the possession of his horse or other goods, and therefore in that case *C.* may be appeal'd of felony by *B.* or indicted of felony, *quod cepit & asportavit* the horse of *B.* 4 *H. 7. 5. b. 13 E. 4. 3. b.*

And that is the reason, that if *A.* steals the goods of *B.* in the county of *C.* and carries them into the county of *D.* *A.* may be indicted for larceny in the county of *D.* for the continuance of the asportation is a new caption; but if he be indicted of robbery, [508] it must be in the county of *C.* where the force and putting in fear was, *de quo postea.* 4 *H. 7. 5. b.*

II. The words of the indictment are not only *cepit*, but *cepit & asportavit*, or *abduxit* or *effugavit*.

If *A.* comes into the close of *B.* and takes his horse with an intent to steal him, and before he gets out of the close is apprehended, this is a felonious taking and carrying away, and is larceny. *Co. P. C. p. 108, 109.* Justice *Dalison's reports.*

So if a guest lodges in an inn, and takes the sheets of the bed with an intent to steal them, and carries them out of his chamber into the

(k) See also *Kel. 42.*

hall, and going into the stable to fetch his horse is apprehended, this is felony, and a felonious taking and carrying away, 27 *Affz.* 39. *Co. P. C.* p. 108. and accordingly it was ruled 16 *Car. 2. B. R.* upon a special verdict found in *Cambridgeshire* (1), *A.* comes into the dwelling-house of *B.* nobody being there, and breaks open a chest and takes out goods to the value of five shillings, and lays them on the floor of the same room, and is apprehended before he can remove them he was indicted upon the statute, and ousted of his clergy by the advice of all the judges, except one; for the taking out of the chest was felony by the common law, and the statute of 39 *Eliz. cap. 15.* alters not the felony, but ousts only the clergy. *Ex libro Bridgeman.*

A. hath his keys tied to the strings of his purse, *B.* a cut-purse takes his purse with money in it out of his pocket, but the keys, which were hanged to his purse strings, hanged in his pocket, *A.* takes *B.* with his purse in his hand, but the string hanged to his pocket by the keys, it was ruled this was no felony, for the keys and purse strings hanged in the pocket of *A.* whereby *A.* had still in law the possession of his purse, so that *licet cepit non asportavit*, 40 *Eliz. Wilkinson's case cited M. 8. Jac. C. B.* (m)

III. As it is *cepit* and *asportavit*, so it must be *felonicē* or *animo furandi*, otherwise it is not felony, for it is the mind that makes the taking of another's goods to be a felony, or a bare trespass only but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and tho these circumstances are various, and may sometimes deceive, yet [509] regularly and ordinarily these circumstances following direct in this case.

If *A.* thinking he hath a title to the horse of *B.* sebeth it as his own, or supposing that *B.* holds of him distrains the horse of *B.* without cause, this regularly makes it no felony, but a trespass, because there is a pretense of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it.

If *A.* takes away the goods of *B.* openly before him or other persons, (otherwise than by apparent robbery) this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons that are known to the owner.

(1) *Simsen's case, Kel. 32.*

(m) See *Crompr. Justice 35. a.*

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If *A.* leaves his harrow or his plow-strings in the field, and *B.* having land in the same field useth it, and having done, either returneth them to the place where they were, or acquaints *B.* with it, this is no felony, but at most a trespass.

If *A.* and *B.* being neighbours, and *A.* having an horse on the common, and *B.* having cattle there, that he cannot readily find, takes up the horse of *A.* and rides about to find his cattle, and having done, turns off the horse again in the common, this is no felony, but at most a trespass.

So if my servant, without my privity, takes my horse, and rides abroad ten or twelve miles about his own occasions, and returns again, it is no felony, but if in his journey he sells my horse, as his own, this is declarative of his first taking to be felonious, and *animo furandi*.

But in cases of larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is, *in dubio*, rather to incline to acquittal than conviction.

IV. It must be of goods personal, for otherwise no felony can be committed by taking them.

[510] 1. Therefore of chattles real no felony can be committed, and therefore the taking away of a ward cannot be felony, nor of a box or chest of charters, that concern land. 10 *E. 4.* 14. b. (*n*)

2. Neither can larceny be committed of things, that adhere to the freehold, as trees, grafts, bushes, hedges, stones or lead of a house, or the like. (*o*)

But if they are severed from the freehold, as wood cut, grafts in cocks, stones digged out of a quarry, then felony may be committed by stealing of them, for they are personal goods. 18 *H. 8.* 2. b. 12 *E. 3.* *Coron.* 119.

(*n*) Nor can felony be committed of bonds, notes, or other writings, that are securities for a debt, because they derive their value from *cibus en actione*, which cannot be stolen. *Dals. New Edit.* p. 501. 8 *C. cap.* 33. but by a late statute a *Geo. II. cap.* 25. the stealing of bonds, bills, notes, &c. is made felony with or without the benefit of the clergy, in the same manner, as if the offender had stolen goods of the like value, with the money secured by

such bonds, &c.

(*o*) But now by 4 *Geo. II. cap.* 32. it is felony to steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron rail or palisado fixed to any house, or out-house, or fences thereunto belonging, and every person, who shall be aiding or abetting, or shall buy or receive any such lead, &c. knowing the same to be stolen, is subjected to the same punishment.

But

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But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continuated but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was agreed by the court of king's bench ^{9 Car. 1.} upon an indictment for stealing the lead of *Westminster-Abbey*. *Dalt. cap. 103. p. 166. (p)*

3. Neither of corn standing upon the ground, for tho it be a chattel personal, and goes to the executor, yet it favours of the realty, while it stands so. *Co. P. C. p. 109.*

4. Larceny cannot be committed of such things, whereof no man hath any determinate property, tho the things themselves are capable of property, as of *treasure trove*, or wreck till seized, tho he, that hath them in point of franchise, may have a special action against him, that takes them.

5. Larceny cannot be committed of things, that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies, tho in [511] a park or warren, fish in a river or pond, wild-fowl, wild swans, pheasants.

But if any of these are kild, larceny may be committed of their flesh or skins, because now they are under propriety.

Of domestic cattle, as sheep, oxen, horses, &c. or of domestic fowls, as hens, ducks, geese, &c. and of their eggs, larceny may be committed, for they are under propriety, and serve for food.

Of those beasts or birds, that are *feræ naturæ*, but reclaimed and made tame or domestic, or serve for food, larceny may be committed, as deer, conies, pheasants, partridges, but then it must be, when he, that steals them, knows them to be tame, and so of reclaimed hawks, and likewise of the young of such larceny may be committed, but of the young of those beasts or birds, that are *feræ naturæ*, tho in a park, and tho the owner hath a kind of property *ratione loci, privilegii & impotentiae*, yet larceny cannot be committed of them, as of young fawns in a park, young conies in a warren: of young pigeons in a dove-coat, fish in a trunk or net, larceny may be committed.

Of young hawks in the nest larceny may be committed, but not of hawks eggs, but the takers are punishable by fine and imprisonment upon the statute of 11 H. 7. cap. 17. and 31 H. 8. cap. 12. (r)

(p) *New Edit. cap. 156. p. 501.*

(r) By this statute it is made felony to take hawks eggs out of any nests within

the king's lands, but this is repealed by the general words of 1 Mar. cap. 1.

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Of wild swans, nor of their young, larceny cannot be committed, but if they be made tame and domestic, or if they be marked and pinioned, it is felony to take them or their young.

But it seems, that if they be marked, and yet flying swans, that range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, because they cannot be known to belong to any: these several instances and differences may be collected from *Co. P. C. p. 109, 110. Dalt. cap. 103. (f), and 7 Co. Rep. 15. b. Case de Swans & libros ibi.*

[512] 6. Larceny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, gray-hounds, blood-hounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, &c. or their whelps, or calves, because, tho reclaimed, they serve not for food, but pleasure, and so differ from pheasants, swans, &c. made tame, which, tho wild by nature, serve for food.

Only of the reclaimed hawk, in respect of the nobleness of its nature and use for princes and great men, larceny may be committed, if the party know it be reclaimed.

V. What shall be said the personal goods of any person, or of another person.

Every indictment of larceny ought to suppose the goods stolen to be the goods of somebody.

An indictment of larceny of the goods *cujusdam ignoti* is good, for it is at the king's suit, and tho the owner be not known, the felony must be punished. *21 H. 6. Enditement 12.*

And yet *10 H. 6. Enditement 9.* an indictment, *quod A. verberavit B. and 20 jacks pretii 20 s. felonice cepit*, held good without shewing whose they were.

But an indictment of *A.* that he is *communis latro* without shewing in particular what he stole, is not good. *22 Affiz. 73.*

An indictment, that *bona domus & ecclesiae tempore vacationis, or bona capelle in custodia J. S. felonice cepit*, is good, *7 E. 4. 14. b. Co. P. C. p. 110. Stamf. P. C. p. 25. b. & 95. b.*

If a man steal bells, or other goods belonging to a church, he may be indicted, *quod felonice, &c. cepit bona parochianorum de B. M. 31 & 32 Eliz. B. R. Hadman and Green versus Ringwood (t), and yet*

(f) *New Edit. cap. 156. p. 499.*

(t) *Cro. Eliz. 145, 179.*

an action of trespass lies for the churchwardens in such case, *quare bona & catalla parochianorum in custodiâ suâ, or in custodiâ A. B. prædecessorum suorum gardianorum ecclesiæ cepit & asportavit ad damnum parochianorum.* T. 36 Eliz. B. R. Method and Barfoot. Dyer 99.

If *A.* have a special property in goods, as by pledge, or a lease for years, and the goods be stolen, they must be supposed in the indictment the goods of *A.*

If *A.* bail goods to *B.* to keep for him, or to carry for [513] him, and *B.* be robbed of them, the felon may be indicted for larceny of the goods of *A.* or *B.* and it is good either way, for the property is still in *A.* yet *B.* hath the possession, and is chargeable to *A.* if the goods be stolen, and hath the property against all the world but *A.*

A. is indicted, that he stole the goods of *B.* and it appears in the indictment, that *B.* was a *feme covert* at the time, the indictment is naught, for they are the goods of her husband, and so if *A.* be indicted for stealing the goods of *B.* and upon the evidence it appears, that *B.* had neither interest nor possession in the goods, or was a *feme covert*, the party ought to be acquitted, but then he may be presently indicted *de novo* for stealing the goods of the husband or true proprietor; and so it once happened before me at Aylesbury 1667. in the case of *Emes*, who was convicted and executed upon a second indictment.

Regularly a man cannot commit felony of the goods, wherein he hath a property.

If *A.* and *B.* be joint-tenants or tenants in common of an horse, and *A.* takes the horse, possibly *animo furandi*, yet this is not felony, because one tenant in common taking the whole doth but what by law he may do.

Yet if *A.* take away the trees of *B.* and cut them into boards, *B.* may take them away, and it cannot be felony; so if *A.* take the cloth of *B.* and make it into a doublet, *B.* may take it, and it cannot be felony. M. 2 Eliz. More n. 67. p. 19.

If *A.* take the hay or corn of *B.* and mingle it with his own heap or cock, or if *A.* take the cloth of *B.* and embroider it with silk or gold, *B.* may retake the whole heap of corn, or cock of hay, or garment and embroidery also, and it is no felony, nor so much as a trespass. H. 36 Eliz. B. R. Popham n. 2. p. 38.

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Yet if *A.* bail goods to *B.* and afterwards *animo furandi* steals the goods from *B.* with design probably to charge him for them in an action of detinue, this is felony; *quod vide 7 H. 6. 43. a. Co. P. C. p. 110. Stamf. P. C. p. 26. a.*

The wife cannot commit felony of the goods of her husband, for they are one person in law, 21 *H. 6. Corone* 455. *Co. P. C. [514] p. 110.* and therefore, if she take or steal the goods of her husband, and deliver them to *B.* who knowing it, carries them away, this seems no felony in *B.* for it is taken, *quasi* by the consent of her husband (*u*), yet trespass lies against *B.* for such taking, for it is a trespass, but *in favorem vita* it shall not be adjudged a felony, and so I take the law to be, notwithstanding the various opinions. *Dalt. cap. 104. p. 268, 269. ex lectura Cooke. (x)*

But if the husband deliver goods to *B.* and the wife had taken them feloniously from *B.* this had been felony in the wife, *Dalt. cap. 104. p. 268.* for if the husband himself had taken them feloniously from *B.* it had been felony, as hath been said; but then it must in both cases be a taking *animo furandi.*

But if a man take away another man's wife against her will *cum bonis viri*, that is felony by the statute of *Westm. 2. cap. 34.* which saith, *Habeat rex seclam de bonis sic asportatis (y)*, 13 *Affiz. 6.* But if it be by the consent of the wife, tho against the consent of the husband, it seems to be no felony, but a trespass, for it cannot be a felony in the man, unless it be a felony in the woman, who consented to it, 13 *Affiz. 6.* but *Dalton* thinks it felony, *ubi supra.*

Yet in some cases the principal agent may be excused from felony, and yet he, that is principal in the second degree, may be guilty, as if a man put a child of seven years to take goods, and bring them to him, and he carry them away, the child is not guilty by reason of his infancy, yet it is felony in the other.

If *A.* die intestate, and the goods of the deceased are stolen before administration committed, it is felony, and the goods shall be supposed to be *bona episcopi de D.* ordinary of the diocese, and if he made *B.* his executor, the goods shall be supposed *bona B.* tho he hath not proved the will, and they need not shew specially their title as ordinary or executor, because it is of their own possession, in which

(*u*) But in case *B.* were her adulterer, Mr. *Dalton* thinks it would be felony, for in such a case no consent of the husband

can be presumed. *Dalton ubi infra*
(*x*) *New Edit. cap. 157. p. 504.*
(*y*) *2 Co. Instit. 434.*

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case a general indictment as well as a general action of trespass lies without naming themselves executor or ordinary, and so for an administrator.

But if servants in the house imbezzle their master's goods after his decease, this seems not to be felony at common law, but only trespass, because the goods were *quodammodo* in their custody; and therefore remedy is provided by the statute of 33 H. 6. cap. 1. that if they appear not upon proclamation, they shall be attaint of felony, but if they appear, they shall answer for it as a trespass.

But an indictment, *quod invenit hominem mortuum, & felonice fūratus fuit duas tunicas* without saying *de bonis & catallis* of the executor or ordinary, is not good, and therefore the party was discharged.

11 R. 2. *Enditement* 27.

A. digged up a dead body out of the grave, and stole his shroud, and buried him again, this is reported by Mr. Dalton, cap. 103. p. 266. to be no felony, but a misdemeanor, for which the party was whipt. And accordingly I have seen it reported to be held 16 Jac. in Nottingham's case (z), *quia nullius in bonis*, but see Co. P. C. p. 110. in Haine's case (a) ruled by the advice of all the judges to be felony, and in the indictment the goods shall be supposed the goods of the executor, administrator, or ordinary.

But it is held, that if *A.* put a winding-sheet upon the dead body of *B.* and after his burial a thief digs up the carcase and steals the sheet, he may be indicted for felony *de bonis & catallis A.* because it transferred no property to a dead man. 12 Co. Rep. 112.

VI. I come to the sixth consideration, who may be said a person committing larceny, but of this I have at large treated before cap. 3, &c. and therefore shall say but little here.

An infant under the age of discretion regularly cannot be guilty of larceny, *viz.* under fourteen years, unless it appears by circumstances, that he hath a discretion more than the law presumes.

A madman, *non compos*, or lunatic in the times of his lunacy cannot commit larceny, but ought to be found not guilty [516] upon due evidence thereof.

A *feme covert* alone may be guilty of larceny, if done without concurrence of her husband. 27 Affiz. 40.

(z) This case is mentioned by Dalton in New Edit. in cap. 156. p. 502.
in the place cited by our author, which (a) 12 Co. 112.

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But it hath generally now obtaind, that she cannot be guilty of larciny jointly with her husband, because presumed to be done by coercion of her husband. *Vide Dalt. cap. 104. (b) Stamf. P. C. fol. 26. a. & libros ibi.*

But this I take to be only a presumption till the contrary appear, for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by her husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband, but *stabitur præsumptio, donec probetur in contrarium*, neither is the book of 2 E. 3. *Corone* 160. to the contrary, but in the book of 27 *Affiz.* 40. where she was indicted alone, inquiry was made, whether it were by coercion of the husband.

And therefore, if *A.* and *B.* his wife be indicted by these names of larciny, the indictment is not void, for the husband may be convicted, tho the wife be acquitted upon the presumption of her husband's coercion.

Again, the husband may be acquitted, and the wife found to have done the felony alone, for every indictment is several in law; or again, tho *primæ facie* the wife cannot be guilty of larciny, no nor of burglary, where the husband is party in the fact, (tho she may be guilty of murder or manslaughter jointly with her husband) and therefore *primæ facie* the wife in such case must be acquitted, yet for my part I think the circumstances may be such, that the wife may be as well guilty in larciny or burglary, as her husband.

If a servant commit felony by the coercion of his master, yet it doth not excuse the servant, tho it excuse the wife, as is before said, for the wife is inseperably *sub potestate viri*, but it is not so with a servant, for as he is not bound to obey his master's unlawful commands, so he may recover damages for any wrong done him by his master. *Dalt. cap. 104. p. 269. (c)*

See Black. Com. Lib. iv. cap. 17. p. 229 to 244. and Foster 73, 223, 224, 366. and 1 Hawk. P. C. Index tit. Larciny.

(b) New Edit. cap. 157. p. 603.

(c) New Edit. p. 604.

C H A P. XLIV.

Concerning the diversities of grand larcinies among themselves in relation to clergy.

ALTHO the punishment of all grand larceny by the law is death (*a*), yet in relation to clergy, which is a kind of relaxation of the severity of the judgment of the law, there is difference made by acts of parliament between some larcinies and others.

By the antient privilege of the clergy, and by the confirmation and special concession of the statute of 25 E. 3. cap. 4. the benefit of clergy was to be allowd in all treasons and felonies touching other persons than the king himself and his royal majesty.

Therefore as well in grand larciny, as in other felonies, clergy is to be allowd, where it is not to be taken away by some subsequent act of parliament.

And in all those cases, wherein it is so taken away, the indictment of such larciny or other felony must bring the case within the particular provision of those statutes, which in such cases takes away clergy, otherwise it is to be allowd, tho upon the evidence it may fall out, that the truth of the fact appears to be such, as is within the special provision of those statutes, that so take away clergy.

The statutes therefore, that take away clergy in some particular larcinies, are these that follow :

I. By the statute of 23 H. 8. cap. 1. " All persons found guilty
" of robbing any church or chapel, or other holy places, or of rob-
" bing any person in his dwelling-house, the owner or dweller of the
" same house, his wife, children or servants then being within, and
" put in fear and dread by the same, or for robbing any per- [518]
" son in or near the high-way, and those, that are found
" guilty of abetting, procuring, helping, or counselling thereof, are
" exempt from the benefit of clergy, except such as are in the order
" of sub-deacon."

But upon this statute, tho there must be a stealing of goods, there

(a) In antient times it was in some cases punished with the loss of a thumb, in others with pillory, and the loss of an ear. *Corone 434. Britt. 24. b.*

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need not be an actual breaking (*b*), for the stealing in the house, and putting the dweller, his wife or servants in fear, is robbery.

This statute extended only to a conviction by verdict or confession, but the statute of 25 H. 8. cap. 3. extended it to a standing mute, or challenging of above the number of twenty, or not directly answering, and also in case of an arraignment of a prisoner for a felony by bringing the goods he stole into one county, where he had first stolen the goods in a foreign county, in one of those manners mentioned in the statute of 23 H. 8. it gave power to the justices, upon examination of the fact, to put the prisoner from his clergy, but herein these things are observable: 1. It did not give power of examination, where the prisoner confessed the felony, but where he put himself upon his trial. 2. These examinations need not be recorded. 3. It did not extend only to those cases, where the prisoner was to be ousted of his clergy by force of the statute of 23 H. 8. and not to other cases, where he was to be ousted of his clergy by any subsequent statute, and therefore upon a robbery in a dwelling-house, where the owner, his wife or servants were within, and not put in fear, he could not be ousted of his clergy by examination in a foreign county upon the statute of 25 H. 8. *Anders. Rep. n. 158. p. 114. Co. P. C. cap. 52. p. 115.*

And therefore it was ruled in one *Cole's case*, a woman broke a dwelling-house in *Kent* in the day-time, none being there, and took away goods above the value of five shillings, and under the value of

[519] ten shillings, and carried the goods into *Suffex*, where she was indicted of larceny, and upon examination it appeared she had broke the house, and took the goods *ut supra*, being above five shillings and under ten shillings, and the jury found accordingly, and she was burnt in the hand, and discharged, for a man in such a case should have had his clergy in the county of *Suffex*, because tho the statute of 39 Eliz. cap. 15. take away clergy in the proper county, yet the statute of 25 H. 8. as to examination and taking away clergy in a foreign county extends only to felonies put out of clergy by 23 H. 8. or 5 & 6 E. 6. cap. 10. *coram domino Bridgman in Suffex ex libro suo.*

(*b*) In the case of robbing a church there must be an actual breaking to bring it within this statute; but by 1 E. 6. cap. 12. it is not necessary, for by that statute all felonious taking of goods out of a

church or chapel is ousted of clergy in all cases, except that of challenging above twenty, which defect is supplied by 3 & 4 W. & M. cap. 9.

Again,

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Again, the statutes of 23 H. 8. and 25 H. 8. did put accessaries before in such cases from the benefit of their clergy, as well as the principals, but as to that they are repealed by 1 E. 6. cap. 12.

But by the statute of 1 E. 6. cap. 12. tho the statute of 23 H. 8. be re-enacted as to the principals in the cases before mentiond, and also in cases of breaking houses to the intent to steal, (any person being therein, and put in fear) if convict by verdict or confession, or standing mute, and not directly answering, yet it hath this general clause, *and in all other cases offenders shall have benefit of their clergy,* and therefore by this act these changes were wrought.

1. In the cases, where clergy was excluded by this act, there is no saving for persons in holy orders.

2. It repeal the statute of 25 H. 8. cap. 3. as to examination in a foreign county, and for that reason the statute of 5 & 6 E. 6. cap. 10. was made, whereby that statute was revived, and stands now in force in every article thereof.

3. It restored clergy to accessaries before in all those cases, wherein they were ousted of clergy by 23 and 25 H. 8. and therefore the statute of 4 & 5 Ph. & M. cap. 4. was made, whereby accessaries before in murder, or robbery in any dwelling-house, or in or near the highways, are ousted of clergy upon conviction, outlawry, standing mute, or challenging above twenty, or not directly answering.

So that the statutes of 23 and 25 H. 8. stand at this day in force with this addition, that persons in holy orders stand equally [520] exempt from the benefit of clergy with others by the statute of 1 E. 6. as to cases within that statute.

But if only a stranger were in the house, and neither the owner, his wife, children or servants, this gives no discharge of clergy by the statute of 23 H. 8. and therefore there was provision in that case by the ensuing statute.

II. But the statute of 1 E. 6. cap. 12. breaking of any house by night or by day, any person being in the house or put in fear, if it were with an intent to steal, tho nothing be stolen, a principal was excluded from clergy in all cases, except outlawry and challenging above twenty.

And also in a foreign county, yet if upon examination it be so found, he is ousted of clergy by the statute of 5 & 6 E. 6. cap. 10. but the accessory before or after is not ousted of clergy by this statute.

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III. By the statute of 5 & 6 E. 6. cap. 9. " If any person be found guilty according to the laws of the land for robbing any person or persons in his or their dwelling houses, or dwelling-places, the owner or dweller, his wife, children or servants being within the same house or place, or in any place within the precincts thereof, such offender shall not be admitted to clergy, whether the owner or dweller, his wife or children, then or there being, shall be waking or sleeping.

" And also he, that robs any persona in any booth or tent, in any fair or market, his wife, children, or servant then being within the booth or tent, shall be excluded from clergy.

This statute is of force, and of great and daily use, and therefore it will be convenient to make some observations upon it.

Upon this statute these things are observable:

1. That it extends not to oust clergy in any case but upon conviction of the offender, either by verdict or confession, for a man that confesseth is found guilty by his confession, but it extends not to standing mute, challenging above twenty, or not directly answering(*c*).

[521] And therefore it is considerable, whether, if a man be attainted by outlawry, he may not be admitted to his clergy as a clerk attainted, which, tho' it avoids not the attainder, yet it may take off the execution, for clergy is allowable to a person attainted, if the case be within clergy, *Cromp. Jurisdic. of Courts* 126. b. (*d*) *Dy.* 205. a. b. and it is held, outlawry upon this statute excludes not clergy. *11 Co. Rep.* 29. b. *Poulter's case*.

2. That yet by the statute of 4 & 5 P. & M. cap. 4. clergy is taken away in this case from the accessory before, as well as in case of standing mute and challenging above twenty, or not directly answering, for the statute of 4 & 5 P. & M. extends to accessories before in all cases of robbing in dwelling-houses, as well those within this statute, as those upon the statute of 23 H. 8.

3. It hath been held by good opinion, that this statute extends only to him that actually enters the house and steals there, and that therefore if *A. B.* and *C.* come to a house in the day-time with an intent to enter, and steal goods, and that *A.* only breaks and enters the house, and takes the goods, that *A.* only shall be excluded of his clergy, and *B.* and *C.* that were aiding and assisting should have their clergy: this

(*c*) But by 3 & 4 W. & M. cap. 9. it extends to all these cases, as also to the case (*d*) *Cromp. Justice* 119. b.

was the opinion of divers judges at a meeting in *Serjeants-Inn* 30 Novemb. 1664. who grounded themselves principally upon *Audley's* case (e), upon the Statute of 39 *Eliz.* hereafter cited, but I think they are all to be excluded of their clergy upon this Statute of 5 & 6 *E. c.* and there cannot be a stronger authority in it, than the judgment of parliament in the Statute of 4 & 5 *P. & M. cap. 4.* whereby it is enacted, " That if any person shall maliciously command, hire, or " counsel any person to commit any robbery in any dwelling-house, he shall be excluded of clergy.

And certainly he, that is present, aiding, and abetting, is more than an accessory before, but then perchance the indictment must not run generally, was present, aiding, and abetting, but that B. and C. did maliciously command, hire, or counsel A. to commit the fact, *Dy. 183. b. 11 Co. Rep. 37. a Poulter's case;* tho, in my own [522] opinion, the words *maliciously present, aiding, and abetting,* do countervail the former, and much more, and it cannot be intended; that the Statute meant to take away clergy from those that maliciously counsel or command, which at most makes but an accessory; and yet that he that is present and abetting, shall have his clergy.

But, in my opinion, all may be indicted, *quod fregarunt & intraverunt, &c.* as in case of burglary or robbery, and it differs from the Statute of 39 *Eliz.* and the rather, because the Statute of 4 & 5 *P. & M.* extends not to offenses made after by 39 *Eliz.*

4. This Statute extends not to breaking of the house with an intent to rob it, but there must be an actual robbing, or taking away goods.

5. The robbing by day or night is within this Statute.

6. The dweller, his wife, children or servants must be within the precinct of the house sleeping or waking, but it is not necessary they should be put in fear, neither is it necessary they should be in the same room where the robbery is done.

7. But it is not enough, that a stranger be in the house, unless the owner, his wife, children, servants or some of them be in the house at the time also, tho it be enough upon the Statute of 1 *E. 6. cap. 12.*

8. There must be not only an actual stealing of some goods in the house, but an actual breaking of the house, for the Statute speaks of robbing, which imports more than a bare taking of goods.

Aug. 14 Car. 1. Thomas Williams, Thomas Bates, and Richard Harper having broken the lodgings of Sir H. Hungate at Whitehall,

(e) *Co. Car. 473.* by the name of *Evans and Finch's cafe.*

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and taken thence several goods of Sir *H. Hungate*, *Croke* and *Crawley* were advised with, to pen the indictment, who agreed these points:

1. It must be laid for breaking the king's mansion-house called *Whitehall* (*f*), and stealing the goods of Sir *H. Hungate*, for all the lodgings in *Whitehall* were part of the king's house, and differ'd from an inn of court, where each chamber is a several mansion-house, because

[523] every one hath a several interest in his chamber. 2. That upon the statute of 5 & 6 E. 6. the indictment need only be, that he broke the king's house called *Whitehall*, and stole the goods of Sir *H. Hungate*, divers of the king's servants then being in the house, without saying, that any body was put in fear (which was necessary by the statute of 23 H. 8.) but merely upon the statute of 5 & 6 E. 6. and accordingly the indictment was drawn. 3. That upon an indictment upon 23 H. 8. or upon 5 E. 6. there must be an actual breaking of the house, and also a robbery or stealing of some thing.

4. That if a thief comes into the house, the doors being open, and then breaks open a chamber-door, and steals goods from thence, this is a breaking of the house within those statutes, and accordingly at the gaol-delivery at the *Old Bailey*, 29 Aug. 14 Car. 1. those two justices being present, they were indicted, and *Harper* being fled, the other two were found guilty; *Williams* was reprieved before judgment, but *Bates* was executed, *ex libro Twisden*.

Upon this latter resolution it seems, that *Bayne*'s case in *Popham's Rep.* 36 & 37 Eliz. n. 10 was somewhat too severe (*g*), where one came into a tavern to drink, and stole a cup that was brought them to drink in, the owner and his servants being in the house, and upon this he was ousted of his clergy upon the statute of 5 & 6 E. 6. which case was doubted by the justices upon a meeting among them Novemb. 1664. but it was then agreed, if two come into a tavern to drink, the door being open, and divers of the family being in the house, and one goes up stairs and breaks a chamber-door, and steals goods, and both depart before the felony be discovered; resolved by us all, that clergy is taken away from him that breaks open the door, if he be indicted upon the statute of 5 E. 6. but not from the other, for the breaking of the door was an act of violence, and so the breaking of a counter or chest (*h*); for a chest *vide postea*.

(*f*) See *Kel.* 27.

(*g*) This case denied to be law, *Kel.* 68.

(*h*) See *Kel.* 69.

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But tho the breaking of the door, or perchance of a counter, may be such an act, as may make it a robbery within the statute of 5 E. 6. yea, and altho in that case before-mentioned, and in a case upon a special verdict out of *Cambridgeshire* before-mentioned, [524] it was held the breaking of a chest was all one as to this purpose with the breaking of a door, tho the chest were not fixed to the freehold, *quod vide antea cap. 43.* yet I must needs say, that the course at *Newgate* hath been always since my time, that the breaking open of a chamber-door, and of a counter or cupboard fixed to the freehold, hath brought it within the statute of 5 E. 6. to oust of clergy; yet when a party enters the doors open, and breaks up only a chest or trunk, and steals thence goods, that is not such a robbery, as is within the statute of 5 E. 6. to oust of clergy, and so was the difference agreed at *Newgate* 1671. upon the robbery of the cook of *Serjeants-inn* in *Fleet-street*, by certain persons that came in to eat, and slipt up stairs, and picked open a chamber-door, and broke open a chest, and stole plate of good value: it was agreed, that the picking open the lock of the chamber-door brought it within the statute to oust clergy, but the breaking open of a chest or trunk only would not oust clergy upon the statute of 5 E. 6. or 39 Eliz. and so by *Lee* secondary was the constant course at *Newgate* in his time.

As to robbery in booths or tents in fairs and markets, within the 5 E. 6. cap. 12. H. 41 Eliz. B. R. the robbing of a shop in *Westminster-hall* was ruled not to be within this statute to be ousted of clergy.

If a servant opens a chamber-door in his master's house, and steals goods, Sir N. Hyde, who was severe enough in cases criminal, doubted whether this were within this statute to oust him of his clergy: *vide infra.*

IV. The next statute relating to this matter of robbing in houses is 39 Eliz. cap. 15. which recites, that the penalty of robbing of houses in the day-time, no persons being in the house at the time of the robbery committed, is not so penal as robbery in any house, any person being therein at the time of the robbery committed, which hath emboldened persons to commit heinous robberies in breaking and entering persons houses, none being in the same, and enacts, "That if any person shall be found guilty by verdict, confession, or otherwise for the felonious taking away in the day-time of money, goods, or chattels to the value of five shillings or upwards [525]

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" in any dwelling-house, or any part thereof, or any out-house or
" out-houses belonging and used with the said dwelling-house or
" houses, altho no person shall be in the said house or houses at the
" time of the felony committed, every such person shall be excluded
" from the benefit of clergy.

Upon this statute these things are observable:

1. That the indictment, whereupon such person is to be excluded
of the benefit of his clergy, ought precisely to follow the statute, *viz.*
it must be in the day-time, and no person being in the house, and must
appear to be so upon evidence.

2. And therefore, if either the indictment pursue not the statute,
or the evidence make not good the indictment, he is to have his
clergy, and therefore upon such an indictment he may be acquitted
of stealing against the form of the statute, and found guilty of simple
felony at common law, tho the indictment conclude *contra formam statuti*; and the same law it is, if an indictment be formed upon the
statute of 23 H. 8. or 5 & 6 E. 6. for tho the indictments in those
cases be special, and conclude sometimes *contra formam statuti*, yet
they include felony at common law, and tho the indictment con-
cluding *contra formam statuti* be good, it is not necessary, so as the
circumstances required by the statute be pursued, for the statutes in
these cases make not the felony, but only exclude clergy, when the
felony is so circumstantiated, as the statute mentions, and is so ex-
pressed in the indictment.

3. If the indictment be formed upon this statute, as that he broke
and entered the house in the day-time, and stole, no person being
in the house, if it appear upon the evidence, that the felony was
committed without these circumstances, as if it were committed in
the night, or not in the day, so that it is burglary; or if com-
mitted when some of the family were in the house, in which case
he had been ousted of his clergy by the statute of 5 & 6 E. 6. if the
indictment had been formed upon that statute, yet in such case the
offender being specially indicted upon the statute of 39 Eliz. shall be
[526] found guilty of simple felony at common law, and shall not
be ousted of his clergy by the statute of 23 H. 8. 1 E. 6.
5 & 6 E. 6. or 18 Eliz. cap. 7. because the indictment is not formed
upon those statutes, but only upon 39 Eliz. and if the circumstances
of the statute of 39 Eliz. upon which the indictment is formed, be
not pursued in the evidence, he must have his clergy, and so is the
constant practice.

4. Altho

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4. Altho this statute of 39 *Eliz.* in the body of the act speaks only of stealing, yet in as much as the preamble speaks of robbery, it hath been always taken, that upon this statute, as well as upon the statute of 5 *E. 6.* there must be these three things concur to oust clergy: 1. There must be *an actual stealing* or taking away of goods of some value upon the statute of 5 & 6 *E. 6.* and of goods to the value of five shillings upon this statute, but it is not necessary, that the goods be carried out of the house, for if he take them out of a trunk or cupboard, and lay them in the room, and be apprehended before he carry them away, it is a stealing within the statutes, and at common law also, as was resolved by all the judges, *uno dissentiente*, in a case out of *Cambridgeshire* upon a special verdict there found upon an indictment upon the statute of 5 & 6 *E. 6. anno 1664.* (i). 2. It must be a stealing of goods *in the house*, and therefore he that steals, or is party to the stealing them, being out of the house, is not by this statute to be ousted of his clergy. 3. Upon this statute, as well as upon the statute of 5 & 6 *E. 6.* there must be some act of force or *breaking*. (k)

Now what shall be said such a force, as must bring the party within this statute, hath been touched before, to which I add, 1. That whatsoever breaking will make a burglary, if it were in the night, will make such a force or breaking, as is within this statute and that of 5 *E. 6.* to oust the thief of his clergy, as if he break open [527] the outward or inward door of the house, pick the lock of such door, draw the latch, break open the window, &c. 2. Some breaking or force will oust clergy upon the statutes of 5 & 6 *E. 6.* and 39 *Eliz.* which will not make a burglary, if it were in the night, as where he enters by the doors open, and breaks open a counter or cupboard fixed to the freehold, as was agreed in the *Cambridgeshire* case before-mentioned.

T. 16 Car. 2. *Simpson's case*, where the case was thus: a man came into a dwelling-house, none being within, and the doors being open, and broke up a chest, and took out goods to the value of five shillings, laid them on the floor, and before he could carry them out of the chamber, he was apprehended, and upon this matter specially found

(i) This was *Simpson's case* mentioned below, and is reported *Kel 31.*

(k) But now by 10 & 11 *W. 3. cap. 23.*
" Whoever by night, or day shall, in any
" shop, ware-house, coach-house, or stable,
" privately and feloniously steal to the va-
" lue of 5*s.* or more, tho such shop be
" not broke open, nor any person therein,
" or shall affist, hire, or command any

" person to commit such offense, shall be
" excluded from the benefit of clergy.
And by 12 *Anns. cap. 7.* " Whoever
" shall feloniously steal to the value of 40*s.*
" in any dwelling-house or out-house
" thereto belonging, altho it be not bro-
" ken, nor any person therein, their aiders
" or affisters are excluded from clergy.

he was ousted of his clergy upon the statute of 39 Eliz. for the taking them out of the chest was felony by the common law, and the statute of 39 Eliz. did not alter the felony, but only excluded clergy; *per omnes justiciarios Angliae*. *Ex libro Bridgman.*

But whereas in that case the breaking open of the chest was held such a force or breaking, as excludes clergy upon that statute, I have observed, that the constant practice at Newgate hath not allowed that construction, unless it was a counter or cupboard fixed; yet note, this resolution of 16 Car. was by all the judges of England then present, and tho one dissented, he after came about to the opinion of the rest. *Ideo quare.*

T. 13 Car. 1. B. R. Evans and Finch (*l*) were arraigned at Newgate upon an indictment, that they at twelve of the clock in the day, *domum mansionalem* Hugonis Audely de interiori templo, *nulla personæ in eadem domo existente, fregerunt*, & 40 l. from thence did steal, a special verdict was found, that *Evans* by a ladder climbed up to the upper window of the chamber of *H. Audely*, and took out of the same forty pounds, and *Finch* stood upon the ladder in view of *Evans*, and saw *Evans* in the chamber, and was assisting to the robbery, and took part of the money, and that at the time of the robbery divers persons were in the Inner Temple-hall, and in divers other parts of [528] the house; ruled, 1. That a chamber in an inn of court is *domus mansionalis* within the statute of 39 Eliz. of him who was the owner of the chamber. 2. That altho this chamber was parcel of the Inner Temple, and other persons were in the hall and other parts of the Inner Temple, yet no person being in the chamber, this offense was within the statute of 39 Eliz. and so it differs from the case of Whitehall before-mentiond, where the indictment was upon the statute of 5 & 6 E. 6. 3. That in as much as *Evans* was only in the chamber, and *Finch* entred not the chamber, *Evans* had judgment of death, and *Finch* had his clergy.

And the like law had been upon the statute of 5 & 6 E. 6. as is before declared, for these statutes only exclude the parties, that actually take out of the dwelling-house, not those that are present and assenters (*m*), as hath been also before declared (*n*) upon the statute of 1 Jac. of stabbing.

(*l*) *Cro. Car. 473.*

(*m*) But by 3 & 4 W. & M. cap. 9. clergy is taken away from all, who comfort, aid, abet, assist, counsel, hire, or command any person feloniously to break any dwelling-house, shop, or ware-house thereto belonging, and feloniously to take away any money, goods, &c. to the value of 5s. or upwards, altho no person be within the same.

(*n*) *Vide ante*, p. 468.

And

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And herein it differs from burglary and robbery, for therein all persons, that are present, aiding, and assisting, are equally burglars or robbers with him, that enters or actually takes; but of this hereafter.

But this statute of 39 *Eliz.* takes not away the benefit of clergy, where the offender stands mute, but only in the case of conviction by verdict, confession, or otherwise according to the laws of the realm; *quære* of outlawry, for there the party is attaint indeed, but not found guilty, for if he reverse the outlawry, he shall plead to the felony. (o)

And thus far for those larcinies, that relate to the dwelling-house of any wherein clergy is excluded.

V. The next statute, that excludes from clergy, is the statute of 1 *E. 6. cap. 12.* and 2 & 3 *E. 6. cap. 33.* which exclude clergy from any person convict by verdict or confession of stealing any horse, mare, or gelding, or wilfully standing mute.

But it takes not away clergy from accessories before or [529] after.

VI. The statute of 8 *Eliz. cap. 4.* by which he that takes money or goods feloniously from the person of any other, privily, without his knowledge, is ousted of his clergy, if convict by verdict or confession, or if he challenge above twenty peremptorily, or stands mute, or will not directly answer, or be outlawed.

Upon this statute these things are observable: 1. It doth not alter the nature of the felony, and therefore, if what he takes away so be not above the value of twelve-pence, it is only petit larciny, as it was before, and so differs from the case of robbery, *Co. P. C. cap. 16. p. 68. Crompt. de Pace, fol. 33. b.* 2. The indictment must be pursuant to the statute, *viz. quod felonice, &c. clam & secreta personâ, &c. cepit,* otherwise the offender hath his clergy. 3. It doth not oust accessories of their clergy, nor it seems doth it oust any of his clergy but him, that actually picks the pocket, and not those that are present, aiding and assisting, upon the reason of *Evan's* case before, for it shall be taken literally;

By an act of this parliament, *viz. * * * (p)*

See table of the principal matters in Foster, Tit. Clergy.

(o) But now by 3 & 4 *W. & M. cap. 9.* clergy is expressly taken away in case of outlawry, or of standing mute, &c.

" from the tenters, or shall embezzle the king's naval stores, are excluded from clergy."

(p) This was left unfinished by our author, but I suppose the statute here meant is 22 *Car. 2. cap. 5.* which "All who shall feloniously & al woolen manufactures

" As to subsequent statutes, which take away clergy from larceny in dwelling-houses, *vide postea sub fine cap. 48.*

C H A P. XLV:

Concerning petit larciny.

PEITI LARCINY is the felonious stealing of money or goods not above the value of twelve-pence without robbery, for altho that by some opinions the value of twelve-pence make grand larciny, 22 Affiz. 39. *per Thorp*, yet the law is settled, that it must exceed twelve-pence to make grand larciny, *West 1. cap. 15. (a) 8 E. 2. Coron. 404.*

The judgment in case of petit larciny is not loss of life, but only to be whipt, or some such corporal punishment less than death, and yet it is felony, and upon conviction thereof the offender loseth his goods, for the indictment runs *felonie*. 27 H. 8. 22.

A party indicted of petit larciny and acquitted, yet if it be found he fled for it, forfeits his goods, as in case of grand larciny. 8 E. 2. *Coron. 406. Stamf. P. C. p. 184. a.*

But in case of petit larciny there can be no accessaries neither before nor after. *P. 9 Jac. 12 Co. Rep. 81.*

If two or more be indicted of stealing goods above the value of twelve-pence, tho in law the felonies are several, yet it is grand larciny in both. 8 E. 2. *Coron. 404.*

But if upon the evidence it appears, that *A.* stole twelve-pence at one time, and *B.* twelve-pence at another time, so that the acts themselves were several at several times, tho they were the goods of the same person, this is petit larciny in each, and not grand larciny in either.

If *A.* be indicted of larciny of goods to the value of five shillings, yet the petit jury may upon the trial find it to be but of the value of twelve-pence, or under, and so petit larciny. 41 E. 3. *Coron. 451. 18 Affiz. 14. Stamf. P. C. p. 24. b.*

[531] If *A.* steal goods of *B.* to the value of six-pence, and at another time to the value of eight-pence, so that all put together exceed the value of twelve pence, tho none apart amount to twelve-pence, yet this is held grand larciny, if he be indicted of them altogether, *Stamf. P. C. p. 24. collected from the book of 8 E. 2. Coron. 415. Dalt. cap. 101. p. 259. (b)*

(a) 2 Co. Infit. 190.

(b) New Edit. cap. 254. p. 494.

But

But if the goods be stolen at several times from several persons, and each a-part under value, as from *A.* four-pence, from *B.* six-pence, from *C.* ten-pence, these are several petit larcinies, and tho contained in the same indictment make not grand larciny.

But it seems to me, that if at the same time he steals goods of *A.* of the value of sixpence, goods of *B.* of the value of six-pence, and goods of *C.* to the value of six-pence, being perchance in one bundle, or upon a table, or in one shop, this is grand larciny, because it was one entire felony done at the same time, tho the persons had several properties, and therefore, if in one indictment, they make grand larciny.

If *A.* steal *clam & secretè* out of the pocket of *B.* twelve-pence, tho the statute of 8 *Eliz.* take away clergy from a pick-pocket, yet it is but petit larciny; *quod vide supra p. 529.*

And so if a man could possibly steal a horse of the value of twelve-pence only, or under, or break a house in the day-time, and steal goods only of the value of twelve-pence, the owner, his wife or children being in the house, and not put in fear, this will be but petit larciny, notwithstanding the statute of 5 & 6 *E. 6.* take away clergy, for that statute altered not the nature of the offense, but takes away clergy, where clergy was before, namely where the offense was capital, as in case of grand larciny.

But if they were put in fear, then it would be robbery, how small soever the value were, and so could not sink into the nature of petit larciny; but of this in the next chapter.

⁴ Blackf. Com. ch. 17. p. 229, &c. Foster 73, 123, 124, 366. See Index of 1 Hawk.
P. C. tit. Larciny.

C H A P. XLVI. [53²]*Of robbery.*

ROBBERY is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling.

In this case it is to be considered, 1. What is a felonious taking from the person. 2. Who shall be said a felonious taker from the person

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person of a man. 3. What violence or putting in fear is requisite to make up robbery. 4. In what cases such a robber is admissible to his clergy.

As to the first.

I. There must be in case of robbery (as also in all cases of larceny) something feloniously taken, for altho antiently an assault to the intent to rob, or an attempt to rob was reputed felony, *voluntas reputabatur pro facto*, 25 E. 3. 42. 13 H. 4. 7. per *Gascoigne* 27 *Affiz.* 38. yet the law is held otherwise at this day (*a*), and for a long time since the time of *Edward III.* and therefore if *A.* lie in wait to rob *B.* and assault him to that purpose, and require him to deliver his purse, yet if *de facto* he hath taken nothing from him, this is not felony, but only a misdemeanor, for which he is punishable by fine and imprisonment. 9 E. 4. 26. b. *Stampf. P. C.* p. 27. b. *Co. P. C.* p. 68.

There is a double kind of taking, *viz.* a taking in law, and a taking in fact.

If thieves come to rob *A.* and finding little about him enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath, for the fear continued, tho the oath bound him not, and in that case the indictment need not be special, for that evidence will maintain a [533] general indictment of robbery, 44 E. 3. 14. b. 4 H. 4. 2. a. *Co. P. C.* p. 68. *Dalt. cap. 100. p. 257. (b)*, who saith it was so adjudged also in *P. 36 Eliz.*

If *A.* assaults *B.* and bids him deliver his purse, and *B.* delivers it accordingly, this is a taking, and so it is if *B.* refuse, and then *A.* prays him to give or lend him money, which *B.* doth accordingly, this is robbery, for *B.* doth it under the same fear, *Dalt. cap. 100. 44 Eliz. Cromp. 34. b.* so it is if *B.* throw his purse or cloak in a bush, and *A.* takes it up, and carries it away; so if *B.* flying from the thief lets fall his hat, and the thief take it and carry it away, for all is the effect of the same fear. *Dalt. ubi supra.*

So if *A.* without drawing his weapon requires *B.* to deliver his purse, who doth deliver it, and *A.* finding but two shillings in it gives it him again, this is a taking by robbery. 20 *Eliz. Cromp. 34. Dalt. ubi supra.*

(a) *Plowd. Com. 259. b.*

(b) *New Ediz. cap. 53. p. 492.*

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If *A.* have his purse tied to his girdle, *B.* assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking; but if *B.* takes up the purse, or if *B.* had the purse in his hand, and then the girdle breaks, and striving lets the purse fall to the ground, and never takes it up again, this is a taking and robbery. *Co. P. C.* p. 69. *Dalt. cap.* 100. *Crompt. fol.* 35.

It is not always necessary, that in robbery there should be strictly a taking from the person, but it sufficeth if it be in his presence, as appears by some of the former instances, in case it be done with a putting in fear: as where a carrier drives his pack-horses, and the thief takes his horse, or cuts his pack, and takes away the goods: so if a thief comes into the presence of *A.* and with violence, and putting *A.* in fear, drives away his horse, cattle, or sheep. *Dalt. ubi supra. Stamf. P. C.* p. 27. a.

II. Who shall be said a person robbing or taking.

If several persons come to rob a man, and they are all present, and one only actually takes the money, this is robbery in all.

Pudsey and two others, *viz.* *A.* and *B.* assault *C.* to rob [534] him in the highway, but *C.* escapes by flight, and as they were assaulting him *A.* rides from *Pudsey* and *B.* and assaults *D.* out of the view of *Pudsey* and *B.* and takes from him a dagger by robbery, and came back to *Pudsey* and *B.* and for this *Pudsey* was indicted and convict of robbery, tho he assented not to the robbery of *D.* neither was it done in his view, because they were all three assembled to commit a robbery, and this taking of the dagger was in the mean time. 28 *Eliz. B. R. Crompt.* 34.

And so it is if *A.* *B.* and *C.* come to commit a robbery, and *A.* stands sentinel at the hedge-corner to watch if any come, and *B.* and *C.* commit the robbery, tho *A.* was not actually present, nor within view, but at a distance from them; and the like in burglary. 11 *H. 4. 13. Co. P. C.* p. 64.

III. What shall be said a putting in fear, or violent taking.

Without putting in fear or violence it is not robbery, but only larceny, and the indictment must run, *quod vi & armis apud B. in regia via ibidem, &c. 40 s. in pecuniis numeratis felonice & violenter cepit a personâ;* and therefore if the word *violenter* be omitted in the indictment, or not proved upon the evidence, tho it were *in alia via regia & felonice cepit a personâ*, it is but larceny, and the offender shall have

his

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his clergy. *Dy. 224. b. H. 17 Jac. in B. R. (c).* Harman was indicted of the robbery of Halfpenny in the highway; and upon the evidence it appeared, that Harman was upon his horse, and required Halfpenny to open a gap for him to go out, Halfpenny going up the bank to open the gap, Harman came by him, and slipt his hand into his pocket, and took out his purse; Halfpenny not suspecting the taking of his purse, until turning his eye he saw it in Harman's hand, and then he demanded it, Harman answered him, *Villain if thou speakest of thy purse, I will pluck thy house over thine ears, and drive thee out of the country, as I did John Soopers,* and then went away with his purse; and because he took it not with such violence, as put Halfpenny in fear, it was ruled to be but stealth, and not robbery, [535] for the words of menace were used after the taking of the purse, wherefore he was found guilty only of larceny, and had his clergy (*d*).

IV. As to the point of clergy in robbery.

The statute of 23 H. 8. cap. 1. (*e*), and 5 & 6 E. 6. cap. 9. do not oust robbery of clergy in all cases, but only in two, *viz.* when the robbery is committed in a mansion-house, the owner, his wife, children or servants being in the house and put in fear (*f*), or when committed in or near the highway.

And therefore *Trin. 38 H. 8. Moore, n. 16. p. 5.* A man indicted of robbery in *quādam viā regiā pedestri ducent' de London ad Islington,* and accordingly found guilty, had his clergy, for the words of the statute are *for robbery in or near the highway he shall be ousted of his clergy,* and therefore the indictment and conviction must be of a robbery in *vel prop̄ altam viam regiam,* and it is not sufficient to say only *viā regiā* or *viā regiā pedestri.*

For where any person is to be ousted of his clergy by virtue of any act of parliament, two things are always requisite. 1. That the in-

(c) 2 *Rol. Rep.* 154.

(d) But it should seem, that this was a private stealing from the person of another, and therefore, if above the value of twelve-pence, would have been ousted of clergy by 8 *A. & R. cap. 4.* if the indictment had been laid pursuant to that statute.

(e) This statute, and that of 25 H. 8. cap. 3. ousts clergy only in cases of conviction, standing mute, not directly answering, &c. challenging peremptorily above the number of twenty, but does not extend to the case of an outlawry, but this

seems to be included in the word *attainted* in 1 E. 6. cap. 12. however it is expressly provided for by 3 & 4 W. & M. cap. 9.

(f) Being put in fear is necessary by the 23 H. 8. cap. 1. (and also by 1 E. 6. cap. 12. which perhaps is the statute intended by our author) but by 5 & 6 E. 6. cap. 9. all that is requisite is, that the owner, &c. be in the house, tho not put in fear, for the expression of that statute is, *the owner, &c. being in the house, whether sleeping or waking.*

dictum bring the fact within the statute, but need not conclude *contra formam statuti.*

2. That the evidence and finding of the jury likewise bring the case within the statute, otherwise the prisoner is to have his clergy.

But an indictment of a robbery in *vel prop̄ altam viam regiam*, tho' the disjunctive is usual at Newgate, for if it be either in or near it, tho' an indictment ought to be certain, yet this is not the substance of the indictment, nor that which makes the crime, but only to ascertain the court as to the point of clergy to serve the statute.

A robbery is committed upon the *Thames* in a ship there [536] lying at anchor below the bridge, on that side of the river which is in *Middlesex*; for this robbery *Hyde* and others were indicted as of a robbery done in *vel prop̄ altam viam regium*, and were ousted of their clergy, for the *Thames* is in truth *alta via regia* the king's high stream; and if it were not, yet it is not far off from it, and the statute says *near* not *next*.

By the statute of 25 H. 8. cap. 3. (g), clergy is ousted upon examination, if the original offence were committed in another county, and excluded from clergy by 23 H. 8. cap. 1. and that statute extends to robbery in a mansion-house, or in or near the highway.

A. robs *B.* on the highway in the county of *C.* of goods to the value only of twelve-pence, and carries them into the county of *D.* it is certain, that this is larceny in the county of *D.* as well as in the county of *C.* but it is only robbery in the county of *C.* where the first taking was, and for robbery he cannot be indicted or appeal'd in the county of *D.* but only in the county of *C.* but he may be indicted of larceny in the county of *D.* and it is certain, though the robbery were but of the value of one penny, yet if *A.* were indicted thereof in the county of *C.* he should have had judgment of death, and been excluded from clergy.

Yet if *A.* be indicted of larceny in the county of *D.* and the jury find the value to be only twelve-pence, he shall only have the judgment of petit larceny, and not suffer death, as he should have done, if he had been indicted of robbery in the county of *C.* altho' it appears upon examination upon the trial in the county of *D.* that it was a robbery; the like law is, if it had been a robbery in a dwelling-house within the statute of 23 H. 8. because it can be no more than petit

(g) This statute was in effect repealed by 1 E. 6. cap. 12. but is revived by 5 & 6 E. 6. cap. 10.

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larceny in the county of *D.* it being found but of the value of twelve-pence, and accordingly resolved by the opinion of all the justices, 31 Eliz. *Moore*, n. 739. pag. 550. for the statute of 25 H. 8. extended to oust them of clergy, where clergy is demandable; but the [537] jury finding the value to be but twelve-pence, or under, no clergy is demandable, because petit-larceny, but the party is to be whipt only.

It hath been before observed; cap. 44. that upon the statute of 29 Eliz. cap. 15. tho *A.* and *B.* be both present and consenting to the breaking and entering of a house to rob, and *A.* only enters into the house, and *B.* stands by, *A.* shall be ousted of his clergy, but *B.* shall have his clergy (*b*), because *A.* only entered the house, and the words of the statute extend only to him that actually enters the house; yet if *A.* and *B.* be present, and consenting to a robbery in or near the highway, or to a burglary, tho *A.* only actually commits the robbery, or actually breaks and enters the house, and *B.* perchance be watching at another place near, or be about a robbery hard by, which he effects not, yet they are both robbers or burglars, and both shall be ousted of their clergy, as in *Pudsey's case*: and the reason of the difference is, because in this case both are robbers and burglars, but in the former case both steal not in the house, but only *A.* and that statute binds up the exclusion of the clergy to stealing in the house.

Anno 1672. at *Newgate*, *Hyde* and *A.* *B.* *C.* and *D.* conclude to ride out to rob, and accordingly they rode out; but at *Hounslow* *D.* parted from the company, and rode away to *Colbrook*; *Hyde*, *A.* *B.* and *C.* rode towards *Egham*, and about three miles from *Hounslow*, *Hyde* *A.* and *B.* assaulted a man; but before he was robbed *C.* seeing another man coming at a distance, before the assault, rode up to him about a bow-shot or more from the rest, intending either to rob him, or to prevent his coming to assist, and in his absence *Hyde*, *A.* and *B.* robbed the first man of divers silk stockings, and then rode back to *C.* and they all went to *London*, and there divided the spoil: it was ruled upon good advice, 1. That *D.* was not guilty of the robbery, tho he rode out with them upon the same design, because he left them at *Hounslow*, and fell not in with them, it may be he repented of the design, but at least he pursued it not. 2. That *C.* tho he was not actually present at the robbery, nor, as I remember, at the assault,

(*b*) But now by the statute of 3 & 4 W. for by that statute clergy is taken away & M. cap. 9. he would not have his clergy, from all aiders, abettors, or assisters.

but

but rode back to secure his company, was guilty as well as *Hyde*, *A.* and *B.* and thereupon *C.* as well as *Hyde*, *A.* and *B.* had judgment of death, and was excluded of clergy, the indictment being for robbery on the highway, according to the resolution in *Pudsey's* case, for they were all robbers on the highway.

Foster 128, 129. 4 Blackf. Com. ch. 17. p. 243. Index to 1 Hawk. P. C. tit: Robbery. Foster. 128, 129. seems contra.

C H A P. XLVII.

Concerning restitution of goods stolen, and the confiscation of goods omitted in the indictment or appeal.

ALTHO this title may seem to come more properly to be examined, when we come to consider of the proceedings and judgment in criminal causes, yet in as much as it properly relates to larceny and robbery of goods, it will not be amiss to take it up here as an appendix to the four former chapters touching larceny and robbery.

There are three means of restitution of goods for the party, from whom they were stolen, *viz.* 1. By appeal of robbery or larceny. 2. By the statute of 21 H. 8. cap. 11. And 3. By course of common law.

I. Upon an appeal of robbery or larceny, if the party were convicted thereupon, restitution of the goods contained in the appeal was to be made to the appellant, for it is one of the ends of that suit.

And hence it is, that if in an appeal of felony or robbery the appellant omit any of the goods stolen from him, they are forfeit, and confiscate to the king. 45 E. 3. Coron. 100.

And so it is, if he brings an appeal of robbery or larceny, [539] and it appears upon the trial, that indeed the goods were the plaintiff's; but yet the appellee came to the goods not by felony, but by finding or bailment or the like without felony, the plaintiff forfeits these goods to the king for his false appeal. 3 E. 3. Coron. 367.

But if the defendant in this appeal be convicted, he shall not only have judgment of death, but the plaintiff shall have a restitution of his goods.

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If *A.* steals the goods of *B.* *C.* and *D.* severally, and *B.* brings his appeal, and convicts the offender, yet before judgment *C.* and *D.* may pursue their appeals, and he shall be arraigned also upon their several appeals. 4 *E.* 4. 11. a.

So if judgment be given against *A.* upon the appeal of *B.* yet if the appeal of *C.* were begun before the attainder, *A.* shall be arraigned upon the appeal of *C.* because he is to have restitution of his goods thereby, yet by the book of 7 *H.* 4. 31. and 12 *E.* 2. *Coron.* 379. it seems, that the second trial at the suit of *C.* is but in nature of an inquest of office to entitle him to the restitution of his goods, because as to the judgment of life he is already in law a dead person, and the book of 4 *E.* 4. 11. (a) speaks not in case of a judgment, but only of a conviction or finding guilty; *quare, vide* 44 *E.* 3. 44. yet *vide* *Stamf.* p. 66 and 107. it seems the attainder is no bar to *C.*

But certain it is, that if *A.* be attaint at the suit of *B.* and then and not before *C.* commences his appeal, *A.* shall not be arraigned thereupon; but if he be afterwards pardoned, then he shall be arraigned at the suit of *C.* commenced after the attainder, 6 *H.* 4. 6. b. 10 *H.* 4. *Coron.* 227. But if the attainder were at the king's suit for that very felony, for which *C.* brought his appeal after the attainder, then it seems he shall not be put to answer it. *Stamf. P. C.* p. 106.

Now touching restitutions upon appeals, *Stamf. Lib. III. cap. 10. fol. 165.* hath given us a full account, I shall follow his method partly and summarily. 1. Where the plaintiff shall have restitution. 2. When. 3. Of what things.

[540] 1. As to the first, where and in what cases the party appellant shall have restitution.

1. It must be upon fresh suit, and tho antiently the law was strict herein as to the time and manner of the pursuit and apprehending of the felon, yet the law is now more liberal.

If the felon be taken by any others, as by the sheriff, yet if the party robbed come within a year after, and gives notice of the felony, and enters his appeal, this is a fresh suit, if he used his diligence shortly after the felony to have taken him. 7 *H.* 4. 43. b.

2. The appellant must proceed with his appeal to convict the felon; but yet in cases of impossibility of such conviction it is sufficient that he used his endeavour; as if he takes the felon, and imprisons him, and he dies within the year, and before the appeal commenced; so if

(a) That case was of a second appeal brought before the party had pleaded to the first.
the

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the party abjure or break prison after he is taken, 12 E. 2. *Coron.* 380. so as the appeal be commenced within the year and day, and that he made fresh suit, 26 *Affiz.* 32. or if he challenge peremptorily above the number appointed by law, stands mute of malice, or hath his clergy (*b*), 8 H. 4. 1. or be outlawed.

2. As to the *second*, when he shall have restitution.

He shall have restitution after judgment against the appellee, and before execution made or prayed. 21 E. 4. 73. *b.*

He shall have restitution after conviction of the principal, and before conviction of the accessory, and after conviction of one of the principals before conviction of the other, or tho the other be acquitted upon his appeal. 21 E. 4. 16 *a.* 10 H. 4. *Coron.* 466.

But if *A.* steal severally the goods of *B.* and *C.* and he be convict upon the appeal of *B.* yet *C.* shall not have restitution till he be convict at his suit also, 4 E. 4. 11. *supra.* altho the felon be convict at the suit of the appellant, yet he is not to have restitution till the fresh suit be inquired, which is to be done by the same jury that convicts the felon, if he plead to inquest, but if he confesses the felony, or stand mute, it shall be inquired by inquest taken *ex officio* by the [541] judge. 1 H. 4. 5. *a.* 2 R. 3. 12. 3 H. 7. 12. *b.*

3. Of what things he is to have restitution.

If a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona vacivata*, nor forfeit to the king or lord of a franchise; but if he waive them upon a pursuit of him, then they are *bona vacivata*, and forfeit to the king or lord of the liberty; *quod vide* 5 Co. Rep. 109. *a.* Foxley's case.

And this forfeiture is not like a stray, where tho the lord may seize, yet the party, who is the owner, may retake them within the year and day, but here the true owner cannot seize his own goods, tho upon fresh suit within the year and day. 8 E. 2. 11. *a.* *Avowry* 151. & E. 3. *Cor.* 162.

But yet this is not an absolute loss of the owner's goods, but rather an expedient settled by law to drive the owner to convict the felon by prosecuting his appeal, and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convict and attaint, and the fresh suit be inquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 5 Co. Rep. 109. Foxley's case, 3 E. 3. *Coron.* 162.

(*b*) 4 E. 4. 19. *b.*

H h 3

But

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But more of restitution under the next general, for it is regularly true, that of what things the owner shall have restitution upon the statute of 21 H. 8. he should have restitution upon a conviction in an appeal at common law, and *& converso*, so that what is said upon the statute, is applicable to restitution upon an appeal.

II. By the statute of 21 H. 8. cap. 11. it is enacted, " That if any person do rob or take away the goods of any of the king's subjects within this realm, and be indicted, arraigned, and found guilty thereof, or otherwise attainted by reason of the evidence of the party so robbed, or owner of the said money, goods or chattels, or any other by their procurement, that then the party so robbed, or owner, shall be restored to his money, goods or chattels, and the justices, before whom such person shall be so attainted, or found [542] guilty by reason of the evidence of the party so robbed, or owner, or by any other by their procurement, have power to reward writs of restitution for the said money or goods, or chattels in like manner, as tho any such felon or felons were attainted at the suit of the party in an appeal.

This statute introduced a new law for restitution: for before this statute there was no restitution upon an indictment, but only upon an appeal. 22 E. 3. *Coron.* 460. *Stamf. P. C.* p. 167. a.

Tho the statute speak of the king's subjects, it extends to aliens robbed; for tho they are not the king's natural-born subjects, they are the king's subjects, when in *England*, by local allegiance.

If the servant be robbed of the master's money, and the master, or his servant by his procurement give evidence and convict the felon, the master shall have a writ of restitution, if it appear upon the indictment and evidence it was the master's money, for the statute gives restitution to the party robbed or owner. *Stamf. P. C.* p. 167.

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of the robbery by the evidence of *A.* he shall have restitution, for so he should have had in case of an appeal.

If *A.* be robbed of an ox by *B.* who sells him to *C.* who keeps the money in his hands, and after kills the ox, and sells the flesh, or if the money be seized in the hands of the thief, *A.* may, if he pleases, have a writ of restitution for the money. *Noy's reports, Harris's case.* (c)

(c) *Noy* 128.

So

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So if money be stolen, and the thief taken, and the money seized, he shall have restitution of the money.

The testator is robbed, the thief is convict upon the procurement of the executor, he shall have restitution. 3 *Eliz. Benl.* 87. *Dy.* 201. 6 *Co. Rep.* 80.

It hath been a great question, if goods be stolen, and by the thief sold in a market-overt, whether the thief being convicted upon the evidence of the party robbed, he shall have restitution upon this statute of the thing sold or not, the buyer not being privy to the felony: those that held he should not, ground themselves upon the book of 12 *H.* 8. 10. Mr. *Dalton's* opinion, *cap.* 111. *p.* [543] 299. (*d*) upon the resolution in the case of *market-overt*, 5 *Co. Rep.* 83. *b.* which was upon occasion of a writ of restitution (*e*), where it is held, that the sale in *market-overt* is a bar to the restitution; and upon the statute of 31 *Eliz.* *cap.* 12. where it is specially provided, that notwithstanding a sale of a horse in *market-overt* the owner may take him within six months after the felony upon proof of his property, which evidenceth, that after the six months he shall not have restitution; and of this opinion was *Hyde* justice (*f*) at the sessions held after *Trin.* 13 *Car.* *Brown* justice *diffidentiae*.

But it seems he shall have restitution upon this statute, notwithstanding the sale in *market-overt* of the goods stolen, and as to the authorities, the 12 *H.* 8. 10. was before the statute of 21 *H.* 8. and Mr. *Dalton's* opinion seems to be grounded upon it; the case of *market-overt*, 5 *Co. Rep.* it is true seems to be against the restitution, tho the case fell off upon this, that the scrivener's shop was no *market-overt* by the custom of *London*.

As to the statute of 31 *Eliz.* to which I may add also the statute of 1 *Jac.* *cap.* 21. that enacts, "No sale of stolen goods in *London*, *Westminster* or *Southwark*, or within two miles to a broker, shall make any change or alteration of the property or interest:" These statutes make nothing as to the case in question, for without question the sale in *market-overt* changeth the property in those cases, wherein these and the like statutes have not enacted the contrary, and therefore the party cannot take them again from the buyer, unless in case of brokers, and stolen horses, *ut supra*: but this comes not to the question in hand, for here the act of parliament gives the restitution, and that only where the felon is convicted; and this restitution is not prevented

(*d*) *New Edit.* *cap.* 164. *p.* 543. (*e*) 1 *And.* 344. (*f*) *Kel.* 35.

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by the sale in market-overt. 1. This act was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution, and it would be small encouragement if a thief [544] by sale in market-overt, which is every day in almost every shop in *London*, should elude it.

2. It were against the common good, and would encourage offenders to the common detriment, if this sale should conclude the owner.

3. The man that is robbed, is robbed against his will, and cannot help it; but the buyer of stolen goods may chuse whether he will buy, or if he buy, may yet refuse to buy, unless well secured of the property of the goods, or knowing the owner.

And if it be said, that the restitution shall be, as in case of an appeal, and a sale in market-overt had barred a restitution in an appeal.

I answer, 1. That it is but *gratis dictum*, that a sale in a market-overt had barred restitution in an appeal, for there is no authority for it, but the only book, that I know in the case, is to the contrary, *viz.* 2 *Co. Instit.* p. 714. If *A.* commit a robbery, the king's officer seizeth the goods stolen, and sells them in market-overt, the party robbed convicteth *A.* upon his appeal, he shall have restitution notwithstanding such sale, if he made fresh suit. 2. But suppose the appellant should not have restitution, yet that restrains not restitution in case of the statute of 21 *H. 8.* for the words *As though he had been attaint in an appeal* are not restrictive, but relative only to the manner of the writ of restitution, which shall be such as in an appeal.

For authorities, 1. It hath been the constant practice at *Newgate*, that sale in market-overt hath not been allowed against this writ of restitution, and this Mr. *Lee*, the secondary there for above thirty years, hath attested openly in the court there oftentimes before myself, and divers others (*g*): again, 2 *Co. Instit.* p. 714. lord *Coke's* opinion was in these words, *So that in this case also, (viz. upon the statute of 21 H. 8. cap. 11.) the party robbed, or owner, shall have restitution notwithstanding any sale in market-overt*, and with this agreed myself and justice *Twisden* upon consideration of this statute.

Upon this statute of 21 *H. 8.* if the offender be convicted [545] upon the evidence of the party robbed, or owner, he shall

(g) See *Kel.* 48.

have

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have restitution, tho there were no fresh suit, or any inquiry by inquest touching the same, and this is constant practice, tho in case of an appeal it be otherwise.

If *A.* be robbed by *B.* of a silver cup, a piece of cloth, and other things, and *A.* prefers an indictment only for one of them, as namely the cloth, and convict the felon, he shall have restitution of no more than what is contained in the indictment, and the goods omitted are confiscate to the king, as in case of goods omitted in an appeal, 44 E. 3. 44. (*h*) *tamen quare*, for it is not really the party's suit. *Vide Dale, cap. 111. p. 298. (i)*

If *A.* have his goods stolen by *B.* and *A.* prefers a bill of indictment, which is found, whereupon *B.* flies and is outlawed, *A.* shall have restitution, for he gave evidence upon the indictment, which, tho it be not a conviction, is the ground of the outlawry, which is an attainer. *Dalt. ubi supra.*

A. and *B.* have their several goods stolen by *C.* *A.* prefers his bill of indictment for his goods, *C.* is thereupon convicted, notwithstanding that conviction *B.* may prefer his bill, and *C.* shall be thereupon arraigned and tried, to the end that *B.* may have his restitution, which he could not have by the conviction upon the indictment of *A.* because a distinct felony, tho most usually at the same sessions the several indictments against the same person are tried by the same jury: *vide 4 E. 4. 11. Stamf. P. C. fol. 167. b.*

But suppose that *C.* be attaint on the indictment preferred by *A.* and reprieved till another sessions, and then *B.* prefer a bill of indictment for another robbery upon him by *C.* in this case *C.* may plead to the country if he please, and upon conviction *B.* shall have restitution, for the court is not bound to take notice at another sessions, that he is attaint; but he may if he please plead *autrefoits attaint*, and refuse to answer, and then by the book of 44 E. 3. 44. in case of an appeal he should have no restitution, but his goods should be confiscate to the king, but I think that to serve the statute of 21 H. 8. as to the point of restitution the court may and in [546] reason ought to inquire by an inquest of office touching the robbery of *B.* and being ascertained of it thereby to grant restitution, tho they ought to give no new judgment of death upon such inquest, at least, unless the prisoner had pleaded to the indictment not guilty, and put

(*b*) This is more directly proved Corone 200.

(*i*) New Edit. *ubi supra.*

himself

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himself upon the country: *vide* 4 E. 4. 11. *Dalt. cap. 111.* p. 714,
715. (*k*), *Stamf. P. C.* p. 107.

And thus far of restitution by the statute of 21 H. 8.

III. Restitution by course of law is either by taking his goods, or by action.

1. As to retaking of goods stolen: if *A.* steal the goods of *B.* and *B.* take his goods of *A.* again to the intent to favour him or maintain him, this is unlawful and punishable by fine and imprisonment (*l*), but if he take them again without any such intent, it is no offense, *Mich. 16 Jac. B. R. Higgins and Andrews (m)*, but justifiable.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them, because he hath pursued the law upon him, and may have his writ of restitution, if he please.

2. By course of common law: *A.* steal the goods of *B.* *viz.* fifty pounds in money, *A.* is convicted, and hath his clergy upon the prosecution of *B.* *B.* brings a *trever* and conversion for this fifty pounds, and upon not guilty pleaded this special matter is found, and adjudged for the plaintiff, because now the party hath prosecuted the law against him, and no mischief to the common wealth; but it was held, that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings *trever*, it lies not, for so felonies should be healed. *M. 1652. B. R. Dawkes and Coveneigh (n)*; *vide accordant Noy's reports (o)*, *Markham and Cob*; but if the plaintiff had not given evidence upon the conviction, it was held, that [547] the action lay not, but the goods were confiscate to the king, and for want of that averment in the case of *Markham*, judgment was given for the defendant in trespass.

Blacks. Com. lib. iv. cap. 29. p. 377. & cap. 27. p. 364.

(*k*) *New Edit. cap. 164. p. 543.*

(*l*) And so seems the practice of advertising a reward for bringing goods stolen, and no questions asked, which I have heard lord chancellor *Maclefield* declare to be highly criminal, as being a sort of compounding of felony, for the goods by that means returning to the right owner, a stop

is put to the inquiry and prosecution of the felon, and thereby great encouragement is given to the commission of such offenses. See *postea, cap. 56.*

(*m*) *2 Rot. Rep. 55.*

(*n*) *Style 346.*

(*o*) *Noy 84.*

C H A P. XLVIII.

Of burglary, the kinds, and punishment.

I COME to those crimes that specially concern the habitation of a man, to which the laws of this kingdom have a special respect, because every man by the law hath a special protection in reference to his house and dwelling. (*a*)

And that is the reason, that a man may assemble people together for the safeguard of his house, which he could not do in relation to travel, or a journey. 21 *H.* 7. 39. *a.*

And upon the same reason it is, that not only by the Statute of 26 *H.* 8. cap. 5. but even by the common law, if any come to commit a felony upon me in my house, and I kill him, it is no felony, nor induceth any forfeiture; *quod vide supra*, p. 487. *vide* Sir *Henry Spelman Gloff.* tit. *Hansecken*, & *ibidem* tit. *Burglaria*, whereby it appears, that by the antient laws of *Canutus* (*b*), and of *H.* 1. (*c*), it was punished with death.

The common genus of offenses, that comes under the name of *Hansecken*, is that which is usually called house-breaking, which sometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to commit felony, [548] so that house-breaking of this kind is of two natures.

1. That which in a vulgar and improper acceptation is sometimes called *burglary*. And,

2. That which in a strict and legal acceptation is so called.

I. As to the former of these, *hamfacken*, house-breaking, or *burglary* in a vulgar acceptation is of several kinds.

1. Robbing of any person by day or night in his dwelling-house, the dweller, his wife, children, or servants being in the house, and put in fear; this requires that there be something taken, but it requires not an actual breach of the house; but it is all one, whether he actually breaks the house, or enters *per ositam aperta*, for it is in

(*a*) That this was the notion among the Romans also appears from *Cicero in oratione pro domo*, cap. 41. *Quid enim sanctius, quid omni religione munitor, quam domus unius cuiusque civium?* hic aræ sunt, hic faci,—*hic per fugium eis ita sanctum omnibus, ut inde obripi*

seminem fas sit.

(*b*) *I. 61.* reckons *irruptio in domum* among the *scelerata inexpiabilita.*

(*c*) *I. 80.* See *Wilk. Leg. Anglo-Sax.* p. 273.

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truth robbery either way, and from this offense clergy is taken away by the statute of 23 H. 8. cap. 1. and 25 H. 8. cap. 3. from the principal, and by the statute of 4 & 5 P. & M. cap. 4. from the accessory.

2. Robbing a person by day or night in his dwelling-house, the dweller, his wife, children, or servants being in the house, and not put in fear; this requires, 1. An actual house breaking of the house. 2. An actual taking of something, but the persons need not be put in fear; and by the statute of 5 & 6 E. 6. cap. 9. clergy is in this case taken from the principal, that enters the house; and by the statute of 4 & 5 P. & M. cap. 4. from the accessory before.

3. Robbing a dwelling-house by day or night, and taking away goods, none being in the house; this requires an actual breaking, and an actual taking of something, and without the latter it is not felony, but if accompanied with both, and the taking of goods be of the value of five shillings, it is excluded from clergy by 39 Eliz. cap. 15.

4. A breaking of the house in the day or night to the intent to steal or commit a felony, any person being in the house, and put in fear, tho nothing be actually taken, this is burglary by the common law, if it is in the night, and felony by the statute of 1 E. 6. cap. 12. tho in the day, and is excluded from clergy by the statute of 1 E. 6. whether by day or by night, but then it requires, 1. An actual breaking of the house, and not an entry *per ostia aperta*. 2. An entry with intent to commit a felony, and so laid in the indictment.

[549] *Poulter's case*, 11 Co. Rep. 31. b.

3. A putting in fear, but accessaries have clergy.

II. Legal or proper burglary is of two kinds, viz. 1. Complicated and mixed with another felony, as breaking the house, and stealing goods, either with putting in fear or without putting in fear, somebody in the house, or nobody in the house, which requires, 1. That it be done in the night. 2. That there be an actual breaking.

2. Simple burglary, and that either, 1. With putting in fear, and then the principal is excluded of clergy by the statute of 1 E. 6. and also from the statute of 18 Eliz. or, 2. Without putting in fear, and then he is excluded of clergy by the statute of 18 Eliz.

And this chapter speaks only of proper or legal burglaries, of those improper burglaries I have spoken before.

Burglary is described by Sir Henry Spelman (c) to be *nocturna di-*

(c) *in verbo burglaria.*

ruptio

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reptio alicuius habitaculi vel ecclesie, etiam murerum portarumque civitatis aut burgi ad feloniam perpetrandam.

My lord Coke *P. C.* cap. 14. p. 63. more fully describes it. "A burglar is he, that in the night-time breaketh and entreth into a mansion-house of another of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.

And accordingly the indictment runs, *quod J. S. 1 die Julii anno &c. in nocte ejusdem diei vi & armis domum mansioadem A. B. felonice & burglariter fregit & intravit, ac ad tunc & ibidem unum scyphum argenteum &c. de bonis & catallis ejusdem A. B. in eadem domo inventum felonice & burglariter furatus fuit, cepit & asportavit*; or if no theft were actually committed, then *ex intentione ad bona & catalla ejusdem A. B. in eadem domo existentem felonice & burglariter furandum, cependum & asportandum, or ad intentione ad ipsum A. B. ibidem felonice interficiendum contra pacem &c.*

And note, that these several clauses in the indictment are essential to the constitution of burglary, 1. That it be said *noctanter*, or in *nocta ejusdem diei (f)*, for if it be in the day-time, it is not burglary. 2. That it be said in the indictment *burglariter*, [550] for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or other circumlocution, and therefore, where the indictment is *burgaliter* instead of *burglariter*, it makes no indictment of burglary, so if it be *burgenter*. 4 *Co. Rep. 39. b. (g)*

3. It must be *fregit & intravit*, for it is held, that breaking without entring, or entring without breaking makes not burglary, *sed de hoc infra*; yet *Trin. 5 Jac. B. R.* an indictment, *quod felonice & burglariter fregit domum mansioalem, &c.* was a good indictment of burglary, and that the entry is sufficiently implied, even in an indictment, by the words *burglariter fregit*, but the safest and common way is to say *fregit & intravit*.

4. It must be said *domum mansioalem*, where burglary is committed in a house, and not generally *domum*, for that is too uncertain, and at large.

5. It must be alleged, that he committed a felony in the same house, or that he brake and entred the house to the intent to commit

(f) See 9 *Co. 66. b.*

(g) See also 5 *Co. 121. b.*

a felony,

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a. felony, but these things will be fuller examined, when we come to particulars.

1. Therefore the time, wherein it must be committed to make it burglary, must be in the night.

It hath been antiently held, that after sun-set, tho day-light be not quite gone, or before sun-rising is *noctanter* to make a burglary, *Dals.* cap. 99. p. 352. (*h*), and accordingly cited by *Crompt.* fol. 32. 6. to have been judged by *Portman*, 3 E. 6. (*i*), and the felons executed, and 21 H. 7. *Kelw.* 75. *a*.

But the latter opinion hath been and still obtaineth, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun or *crepusculum*, it is not night, nor *noctanter* to make a burglary; and with this agrees *Co. P. C.* p. 63. and hence it is, that altho a town unwalled shall not be amerced for the escape of a murderer, if the murder were committed in the night, yet if it were done only in *vespere diei*, the township shall be amerced. 3 E.

[551] 3. *Coron.* 293. And if a robbery be committed before sun-rising, or after sun-set, and whilst it is so far day-light, that the countenance of a man can be reasonably discerned by the light of the day, yet the hundred shall be charged, otherwise where it is done in the night, 7 *Co. Rep.* 34. *Milburn's case*: but this is not intended of moon-light, for then midnight house-breaking should be no burglary; and the word *noctanter* is to be applied to all that follows, *viz. fregit & intravit*, if the breaking of the house were in the day-time, and the entring in the night, or the breaking in the night, and entring in the day, this will not be burglary, for both make the offense, and both must be *noctanter*: *vide Crompt.* 33. a. ex 8 E. 4. (*k*)

But if they break a hole in the house one night, to the intent to enter another night and commit felony, and accordingly they come at another night, and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entring were both *noctanter*, tho not the same night; and it shall be supposed, that they brake and entred the night when they entred, for the breaking makes not the burglary till the entry.

(*h*) *New Edit. cap.* 151. p. 486.

(*i*) See the like judgment *per Fineux*, *Crompt.* 33. *a.*

(*k*) This case does not fully prove the point it is brought for, for the resolution

there was only, that if thieves enter in by night at an hole in the wall, which was there before, it is not burglary, but it does not appear who made the hole.

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2. There must be a breaking and an entry to make the burglary; and therefore I shall speak of them both together.

Antiently the law was so strict against burglary, that the very coming to a house with intent to commit a burglary was held punishable with death, *Cromp. 31.* by Sir *Anthony Brown*; but that obtains not now for law without a burglary committed.

Fredit, there is a double kind of breaking, 1. In law, and thus every one that enters into another's house against his will, or to commit a felony, tho' the doors be open, doth in law break the house. 2. There is a breaking in fact an actual force upon the house, as by opening a door, breaking a window, &c.

And altho', in the remembrance of some yet alive, Sir *N. H.* (*l*) chief justice did hold, that a breaking in law was sufficient to make a burglary, as if a man entred into the house by the doors open in the night, and stole goods, that this is burglary, and [552] accordingly is *Cromp. 32. a. 27 Affiz 38.* yet the law is, that a bare breaking in law, *viz.* an entry by the doors or windows open is not sufficient to make burglary without an actual breaking, *C. P. C. p. 64.* and so the law hath been generally taken to this day in case of burglary. (*m*)

And these acts amount to an actual breaking, *viz.* opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger, *Dalt. cap. 99. (n)*, *Cromp. 33. a.* and so is common experience.

To take down a pane of glass of a glass-window by taking out or bending aside the nails that fasten it is a breaking of a house within this law, because the glass-window is parcel of the house.

It was held by *Manwood* chief baron, that if a thief goes down a chimney to steal, this is a breaking and entring, *Cromp. fol. 32. b.* and hereunto agrees Mr. *Dalton*, *p. 253. (o)*

There was one arraigned before me at *Cambridge* for burglary, and upon the evidence it appeared, that he crept down a chimney; I was doubtful whether this were burglary, and so were some others; but upon examination it appeared, that in his creeping down

(*l*) Sir *Nicholas Hide*, see *Gro. Car. 63.* 225.

(*o*) The reason of this seems to be, because it is as much shut as the nature of the thing will admit.

(*m*) See *Kel. 67 & 70*

(*n*) *New Edit. p. 497.*

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Some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question, and direction was given to find it burglary; but the jury acquitted him of the whole fact.

In some cases there may be a burglary committed by a man without an actual breaking.

Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary (*p*), *Co. P. C.* p. 64. The

[553] like happened in *Black Fryars* 1664. where thieves pretending that *A.* harboured traitors, called the constable to go with them to apprehend him, and the constable entring, they bound the constable, and robbed *A.* and were executed for burglary, and yet in both cases the owner opened the doors of his own accord, at the command of the constable. *Cromp.* 32. 6.

Thieves come in the night to rob *A.* who, perceiving it, opens his door, and issues out and strikes one of the thieves with a staff, another thief having a pistol in his hand, perceiving others in the entry ready to interrupt them, puts his pistol within the door over the threshold, and shot, so that his hand was over the threshold, but neither his foot, nor the rest of his body, and upon this evidence by great advice it was adjudged burglary, and the thief hanged, and yet he brake not the house. 26 *Eliz. Cromp.* 32. a.

If *A.* the servant of *B.* conspire with *C.* to let him in to rob *B.* and accordingly *A.* in the night-time opens the door or window, and lets him in, this is burglary in *C.* but larceny in *A.* the servant, *Dalt. cap. 99.* p. 253. (*q*). it seems it is burglary in both, for if it be burglary in *C.* it must needs be so in *A.* because he is present, and aiding to *C.* to commit this burglary.

If *A.* enter the house of *B.* in the night-time, the outward door being open, or by an open window, and when he is within the house, turns the key of a door of a chamber, or unlatcheth a chamber door to the intent to steal, this is burglary, tho the outward door were open; and so it was adjudged upon a special verdict before me at the sessions at *Newgate* 1672, by advice of many judges then also present.

(*p*) Because in *fratres legis*; for the same reason it is burglary, where the thieves gain entrance by pretenses of business with one

in the house, *Kel. 42.* or of executing any process, or the like, *Kel. 43; 44.* 62. 82.

(*q*) *New Edit.* p. 437.

And

And so it is, if a thief be lodged in an inn, and in the night he stealeth goods, and goeth away, or if he enters into the house secretly in the day-time, and there stayeth till night, and then steals goods and goes away, this is not burglary, *Dalt.* *ubi supra* p. 253. and *Cromp.* 34. a. but if in either of the cases they had opened an inner chamber door, and taken the goods, it had been burglary, agreed 1672. (r)

The servant lies in one part of the house, the master in [554] another, and the stair-foot door of the master's chamber is latched; the servant came in the night, and unlatched the stair-foot door, and went up into his master's chamber with a hatchet intending to kill him, and wounded him dangerously, but the master escaped (s). Upon this special matter found at *Winchester* assizes, by the advice of the greater number of the judges, *exceptis paucis* (t), it was adjudged burglary, and the offender was executed. *T. 16 Jac. Hutt. Rep.* the case of *Haydon* and *Edmunds* (u)

If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary against the opinion of *Dalt.* p. 253. (x) out of Sir *Francis Bacon*, for *fregit & exivit, non fregit & intravit.* (y)

If A. be a lodger in an inn, and he goes up to his chamber to bed, and the chamberlain pulls the door and latches it, or A. himself locks it, and in the night he riseth, openeth his chamber door, steals goods in the house, and goes away, it may be a question, whether this be a burglary; it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the inn-keeper's house, for A. hath a special property in his chamber; but if he had opened the chamber of B. a lodger in the inn to steal his goods, this had been burglary.

And in that case of a lodger, tho he hath a special interest in the chamber, yet he being but a lodger, and in an inn, the burglary must be supposed of the mansion-house of the inn-keeper (z): *vide plus infra.*

If A. enters into the house of B. in the night, by the doors open, and breaks open a chest, and takes away goods without breaking

(r) *Kel.* 69.

(s) In old times this would have been adjudged petit treason, for anciently where the intent was so apparent *voluntas reprobatur pro facto.* *Cron.* 383.

(t) They all concurred, except *Winch.* who doubted.

(u) *Hutt.* 20. *Kel.* 67.

(x) *New Edit.* p. 487.

(y) But now this doubt is settled by 12 *Ann. cap. 7.* whereby breaking to get out is put upon the same foot with breaking to get in.

(z) *Kel.* 83.

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open of an inner door, this is no burglary, because the chest is no part of the house. (a)

[555] But if he breaks open a study or counting-house, or shop within the house, this is burglary, tho none usually lodge in the study; and the same law seems to be, if he breaks open a cupboard or counter fixed to the house (b); *quære*.

3. *Fredit & intravit*. There must be an entry as well as a breaking, and both must be in the night, and with an intent to steal, otherwise it is no burglary.

A. intending to rob *B.* breaks a hole in his house, but enters not, *B.* for fear, throws out his money to him, *A.* takes it and carries it away, this is certainly robbery, and some have held it burglary, tho *A.* never entred the house; and so it is reported to have been adjudged by *Saunders* chief baron. *Cromp. 31. b. tamen quære.* (c)

If *A.* breaks the house of *B.* in the night-time, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine to reach out goods, or puts a pistol in at the window with an intent to kill, tho his hand be not within the window, this is burglary. *Co. P. C. p. 64.*

But if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary; *quære*.

A. B. and C. come in the night by consent to break and enter the house of *D.* to commit a felony, *A.* only actually breaks and enters the house, and *B.* stands near the door, but actually enters not, *C.* stands at the lane's end, or orchard gate, or field gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others, if help comes, this is burglary in them all, tho *A.* only actually brake and entered the house, and they all, in law, are principals, and excluded from clergy by the statute of 18 *Eliz.* cap. 7. and so it is in robbery, as hath been said, 11 *H. 4.* 13. b. *Cromp. 32. a. Co. P. C. p. 64.*

If *A.* being a man of full age, take a child of seven or eight years old well instructed by him in this villainous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to *A.* who carries them away this is burglary [556] in *A.* tho the child that made the entry, be not guilty by reason of his infancy.

(a) *Kel. 69.* But it is a felony, for which the offender is ousted of his clergy, by 3 & 4 *W. & M.* cap. 9.

(b) *Kel. ubi supra;* (c) It was adjudged by *Mortimers* chief justice *C. B.* and *Saunders* only related it.

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So if the wife, in the presence of the husband, by his threats or coercion breaks and enters the house of *B.* in the night, this is burglary in the husband, tho the wife, that is the immediate actor, is excused by the coercion of her husband.

4. *Domum mansionalem*: what shall be so said.

An indictment, *quod felonice & burglariter fregit & intravit ecclesiam prochalem de D. ea intentione, &c.* is a good indictment of burglary, for *ecclesia* is *domus mansionalis*. *Co. P. C. p. 64. Dy. 99. a. (d)*

If *A.* having a dwelling-house, and upon occasion he and all his family are absent a night or more, and in their absence in the night a thief breaks and enters the house to commit felony, this is burglary. *Co. P. C. ubi supra.*

So if *A.* have two mansion-houses, and is sometimes with his family at one, and sometimes at the other, the breach of one of them in the absence of his family from thence is burglary (*e*). *4 Co. Rep. 40. a. 39 Eliz. Dalt. cap. 99. p. 254. (f)*

If *A.* have a chamber in a college or inn of court, where he usually lodgeth in term-time, and in his absence in the vacation his chamber or study be broken open, *&c.* this is burglary, and the indictment shall suppose it *domus mansionalis A.* *Co. P. C. p. 65. 14 Car. 1. Audley's case before cited. (g)*

So it is, if *A.* hires a chamber in the house of *B.* for a certain time wherein he lodgeth, and during the time contracted for, it is broken open, *&c.* this is burglary, and the indictment shall suppose it to be *domum mansionalem of A.* (*h*)

But if, in the king's house at *Whitehall*, or in the great house of any nobleman, there be apartments or lodgings assigned to the jeweller, treasurer, steward, chamberlain, *&c.* and any

(d) Lord Coke says it is the mansion-house of Almighty God, but this is only a quaint turn without any argument, and seems invented to suit his definition of burglary, *viz.* the breaking into a mansion-house, whereas it appears from *Spelman loco supra citato*, and 22 *Eliz. 95.* that it is not necessary to burglary, that a mansion-house be broken, for the breaking of churches, the walls or the gates of the city is also burglary, and the word *mansionalis* is only applicable to one kind of burglary, *viz.* the breaking of a private-house, in which case it must be a dwelling-house.

(e) Even tho he had never lodged in it,

but was removing his goods there in order to lodge in it, *Kel. 46.*

(f) *New Edit. p. 488.* See also *Pope. 52. Mo. 660.*

(g) *Gro. Chr. 473.* by the name of *Evans and Finch.*

(h) Chief justice *Keeling* was of a different opinion, and thought in such case the indictment ought to be laid for breaking *domum mansionalem of B.* for while there is but one entrance, it is but one dwelling-house, tho there be several inmates, but otherwise it is, if a man divides some rooms from the rest of the house, and make another door to those rooms, *Kel. 83. &c.*

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of these lodgings be broken up burglarily, the indictment must suppose it to be *domus mansionalis* of the king, or of him that is truly lord or proprietor of the house, for they have the use of the lodgings as servants only, and not as owners: *Hungate's case* before cited. (i)

And so it is, if *A.* comes to the inn of *B.* and there hath a chamber appointed for his lodging, and this chamber is broken up burglarily, it shall suppose it to be *domus mansionalis* of *B.* the inn-keeper, because the interest is in him, and *A.* hath only the use of it for his lodging, without any certain interest.

A tent or booth in a fair or market is not such a *domus mansionalis*, wherin burglary may be committed, but robbery therein committed, the owner, his wife or servants being therein, is specially exempted from clergy by the statute of 5 & 6 E. 6. cap. 9. before mention'd. *Co. P. C. p. 64.*

If *A.* have a shop parcel of his mansion-house, and it be broken open in the night, &c. it is a burglary, and the indictment shall suppose, that he brake and entered *domum mansionalem* of *A.* for it is parcel thereof.

But if *A.* lets the shop to *B.* for a year, and *B.* holds it, and works or trades in it, but lodgeth in his own house at night, and this shop is broken open, &c. the indictment cannot be, that *domum mansionalem* of *A.* fregit, for it was severed by the lease during the time (k), but then whether he may be indicted for burglary, as in the *domus mansionalis* of *B.*? and certainly it is agreed on all hands, if *B.* or his servant sometimes lodge in the shop, it is burglary, and it shall be supposed *domus mansionalis* of *B.*, and this is common experience.

[558] But suppose he never lodges there, but only works or trades therein in the day time, and he or his servants never lodge there at night, whether this be a burglary to break and enter this shop to commit a felony?

And certainly it was in this case antiently held burglary, M. 37 & 38 Eliz. *B. R. Cole's case* (m), an indictment, quod *shopam cuiusdam Ricardi burglariter & felonice fregit & intravit* &c. it was admitted, for the matter, by court of king's bench to be good; but doubted, whether it was good, because it was *cuiusdam Ricardi* without mentioning his surname, and with this also agrees my lord *Coke in terminis*, *Co. P. C. p. 64.* in these words: *But a shop wherein any person doth con-*

(i) p. 522.

(k) *Kd. 84.*

(m) *M. 466.*

verfe,

everse, being parcel of a mansion-house or not parcel, is taken for a mansion-house.

But *T. 17 Jac. Hutton's Rep.* 33. it is ruled to be no burglary to break open such a shop, and accordingly the practice hath always gone at *Newgate* sessions since my time or observation, and to this day it is holden no burglary to break open such a shop; but if the shop keeper, or his servant, usually or often lodge in the shop at night it is then *domus mansionalis*, in which a burglary may be committed.

Domus mansionalis doth not only include the dwelling-house, but also the out-houses, that are parcel thereof, as barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, tho' they are not under the same roof, or joining contiguous to it; and therefore, if such stable or out-house belonging to the dwelling-house be broken open in the night-time with intent to steal, it is burglary, and with this agrees *C. P. C. p. 64, 65. Dalt. cap. 99. p. 254, 255.* where for breaking open a back-house of *Robert Castle's*, eight or nine yards distant from the dwelling-house, only a pale reaching between them, two were arraigned and condemned for burglary; and so it was agreed by all the judges in the time of chief justice *Hyde* last 1665. and the law was accordingly, and the contrary practice in one much blamed; and altho' it was said by some, that it had not been so used, and that the statute of 4 & 5 P. & M. cap. 4. distinguished between a dwelling-house and a barn, yet at length all the [559] judges agreed, that the felonious breaking of a barn, parcel of a messuage, to steal corn, was burglary according to my lord *Coke*, *ubi supra*, and with this agrees 2 E. 6. B. *Corone* 180.

But if the barn, or stable, or cow-house be no parcel of the messuage, as if a man takes a lease of a dwelling-house from *A.* and of a barn from *B.* or if it be far remote from the dwelling-house, and not so near to it as to be reasonably esteemed parcel thereof; as if it stands a bow-shot off from the house, and not within, or near the curtilage of the chief house; then the breaking of it is not burglary, for it is not *domus mansionalis*, nor any part thereof.

An indictment that *noctanter clausum or curtilagium felonice & burglariter fregit ad occidendum or furandum* is not good, and yet 22 *Affiz.* 95. burglary is defined to *break houses, churches, walls, courts, or gates in time of peace.* (n)

(n) This was antiently understood only of the walls or gates of the city: vide *Skelton* wherein he applies it to the wall of a private man in *verbis burglaris*; if so, it will not support our author's following conclusion,

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So that by that book it should seem, that if a man hath a wall about his house for its safeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the house open, he enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court, and found the door of the house open; then it had been no burglary.

5. To make up burglary, it must not be only to break and enter a house in the night-time, but either a felony must be committed in the house, or it must be to the intent to commit a felony.

If the indictment be, *quod domum mansionalem J. S. felonice & burglariter fregit & intravit, & ad tunc & ibidem certain goods of J. S. felonice & burglariter furatus fuit, cepit & asportavit*, the indictment compriseth two offenses, viz. burglary and felony, and therefore he may be acquitted of burglary, if the case be so, upon the evidence, and found guilty only of the felony, and then he shall have his clergy.

[560] Or he may be acquitted of the felony, but then *quaer*, whether he can be found guilty of the burglary, because tho where the indictment compriseth burglary and felony, the indictment is good, tho it be not supposed in the indictment, that it was *ea intentione ad bona furandum*, for the act of theft being charged at the same time, it is a sufficient evidence of his intention; but when he is acquitted of the felony, then, there being nothing expressly charged in the indictment, that *burglariter fregit, &c. ea intentione ad bona &c. felonice furandum*, it stands single as if the indictment had been of single burglary, in which case the clause of *ea intentione ad furandum &c.* had been necessary to complete a single burglary.

It seems therefore necessary in such case not only to charge him, that *in nocte & burglariter & felonice domum, &c. fregit & intravit, & bona &c. cepit*, but also farther to say *ea intentione ad bona & catala &c. in eadem domo existentia felonice & burglariter furandum*, and to add also the particular felony, *& ad tunc & ibidem unum scyphum argenteum &c.* and then, tho he be acquitted of the felony, the rest of the indictment stands good against him as a simple burglary, and he may be convicted of it, tho acquitted of the felony.

And I think that as the offenses of burglary and felony may be joined in the same indictment, so three offenses may be joined in the same indictment, and if he be acquit of the one, he may be convicted of the other two, and it may be of use to exclude a malefactor of his clergy where the offense is great, as namely for burglary, for felony, and

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and for felony upon the statute of 5 & 6 E. 6. cap. 9. for there may be an offense against that statute, which will exclude from clergy, and yet not amount to burglary; and the form of the indictment may run thus, *Quod A. prima die Februarii anno regni domini Caroli &c. in nocte ejusdem diei vi & armis apud B. felonice & burglariter domum mansionalem fregit & intravit eā intentione ad bona & catalla ejusdem B. in eādem domo existentia felonice & burglariter furandum, capiendum & asportandum, & ad tunc & ibidem vi & armis unum scyphum argenteum ejusdem B. in eādem domo existentem felonice & burglariter furatus fuit, cepit & asportavit, ipso B. ac uxore, liberis & famulis suis in eādem domo tunc existentibus, contra pacem, &c.*

And note, that such an indictment need not conclude *contra formam statuti*, it is sufficient that it brings the case so [561] within the statute, as to exclude clergy; and so, upon the statute of 23 H. 8. cap. 1.

And upon this indictment, if it falls out upon the evidence that he is guilty of the burglary, but not guilty of the stealing, he may be convict of the burglary, and so ousted of clergy, tho he be found not guilty of the felony: again, tho he be found not guilty of the burglary, because, it may be, the breach of the house was in the day-time, the dweller, his wife or servants in the house, yet he may be found guilty of the felony within the qualifications contain'd in the indictment puruant to the statute of 5 & 6 E. 6. and so ousted of his clergy, for that is not confined either to the day or night: again, if upon the evidence it appears not to be burglary, because done in the day-time, nor yet felony so qualified as is excluded from clergy, because either there was no act of breaking, or if there were, yet the dweller, his wife or servants were not in the house, he may be convict of common larciny, and so have benefit of clergy.

And so much for burglary joined with larciny.

Simple burglary is where the breaking and entring is *eā intentione ad bona & catalla furandum*, or *ad interficiendum*, &c. and this clause, as it is usually added in cases of simple burglary, so it is necessary; and hereupon these things are observable.

1. That altho the breaking and entring be charged to be done *burglariter*, yet if the intention of that entry be either laid in the indictment, or appears upon the evidence to be to the intent only to commit a trespass and not a felony, as *eā intentione ad ipsum A. ad tunc & ibidem verberandum*, it is no burglary, but it must be laid and

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proved to be *ad intentionem* to steal or to kill, or to commit some other felony, for tho the killing or murder may be the consequence of beating, yet, if the primary intention were not to kill, the intention of beating will not make burglary. *Co. P. C. p. 65. 13 H. 4. 7. b.*

2. That if a man in the night breaks and enters a house to the intent [562] to commit a felony, tho he attains not that intent, but takes or steals nothing, this is burglary, and excluded from clergy. *22 Affiz. 39. & 95. Dy. 99. Crompt. 31. a. Coron. 264. Statu. P. C. p. 30. a. Co. P. C. p. 63.* and herein it differs from robbery.

3. It seems, that the intention to commit a felony to make a burglary must be an intention of such a fact, as was felony by the common law (and not of a felony newly made by act of parliament), as larceny, or homicide.

It hath been therefore doubted, whether the breaking of a house in the night with intent to commit a rape be burglary or not, *Crompt. fol. 32.* thinks it is not, because, made felony by the statute of *Westm. 2. cap. 34. (p.)*; but *Dalt. cap. 99. p. 255. (q.)*, thinks it would be burglary; because, rape was felony by the common law, until the statute of *Westm. 1. cap. 13. (r.)*, which turned it into a trespass punishable by two years imprisonment, and so the statute of *Westm. 2.* was but a restitution of the common law, and a setting aside of the statute of *Westm. 1.* and this seems to be the more warrantable opinion that it is burglary; but of this hereafter.

Now as to clergy in case of burglary.

If it be such a burglary, as is also joined with actual theft or robbery, and that robbery or theft be so laid in the indictment, and proved upon evidence, as answers the statute of *23 H. 8. cap. 1. or 1 E. 6. cap. 12. or 5 & 6 E. 6. cap. 9.* whereof enough hath been said before, then the principal in such burglary is in those cases, which are within those statutes, ousted of his clergy, and the accessaries *before* are ousted of their clergy by the statute of *4 & 5. P. & M. cap. 4.* but the accessaries *after* have their clergy, as hath been said; but in case of simple burglary, or burglary with theft, laid to be only *felonice & burglariter*, the principal is ousted of clergy if outlawed or convicted by verdict or confession, but is not ousted of clergy in case of standing mute, not directly answering, or challenging above twenty, by the statute of *18 Eliz. cap. 7. (f.)*

(p) 2 Co. Infit. 433.

(q) New Edit. p. 489.

(r) 2 Co. Infit. 180.

(f) This defect is supplied by 3 & 4 W³ & M. cap. 9.

But

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But by the statute of 1 E. 6. cap. 12. "If the breaking of the house be in the day, or night time with intent to rob or steal, any person being in the house and put in fear, tho nothing be stolen, yet he shall be ousted of his clergy, if convict by verdict or confession, or stand mute, or challenge peremptorily above twenty (*t*);" for this statute extends to this special kind of burglary, 11 Co. Rep. 36. b. *Poulter's case*, tho nothing be stolen, and so differs from the statutes of 23 and 25 H. 8. which require a stealing, as well as a breaking the house.

(But tho in case of robbery in any dwelling-house, and therewith putting in fear, according to the statute of 23 H. 8. cap. 1. or without putting in fear according to the statute of 5 & 6 E. 6. cap. 9. the malicious commanding, hiring or counselling of such offense is put out of clergy, if so specially laid in the indictment, Dy. 183. b. by the statute of 4 & 5 P. & M. cap. 4. yet such accessories *before*, are not oust of clergy in case of breaking a house to commit a robbery putting in fear, tho the principal be ousted of clergy by 1 Eliz. cap. 12.)

But accessories before or after are not ousted of clergy by this statute, or the statute of 4 & 5 P. & M. cap. 4.

And this statute doth oust of clergy not only those that actually break, or actually enter the house, but also all those that are, in law, principals in burglary, all those that are present, aiding and assisting, or that stand to watch at the field-gate, while the others of the confederacy or company break and enter the house.

And so it differs from the case of robbing of a person in his dwelling-house, none being within, upon the statute of 39 Eliz. cap. 15. for that statute excludes from clergy only those persons that actually enter into the house, and not those who, tho of the confederacy, and present aiding and abetting, yet never entred the house; *quod vide supra*.

But as to accessories *before* or *after*, they are not ousted of their clergy by the statute of 18 Eliz. cap. 7. nor doth the statute of 4 & 5 P. & M. extend to oust accessories *before* of clergy in cases [564] of burglary (*u*); but in cases of robbing of houses within the

(t) This statute does not exclude those who challenge peremptorily above twenty; but they are since excluded by 3 & 4 W. & M. cap. 9. .
this, according to our author's opinion, (*u*) But they are since ousted by 3 & 4 W. & M. cap. 9.
vide postea Lib. II. cap. 48. was needless;

qualifications

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qualifications and circumstances of the statute of 23 H. 8. cap. 1. or 5 & 6 E. 6. cap. 9. and not to burglary at large. (x)

[565] And thus far concerning larceny, robbery and burglary, which are felonies by the common law.

There are two exceptions, that are added hereunto.

(x) Since our author wrote, there have been other statutes made to take away clergy in cases of larceny committed in dwelling-houses, &c.

By 3 & 4 W. & M. cap. 9. "Clergy is ousted from those who shall feloniously take away any goods in any dwelling-house, any person being therein and put in fear, or shall rob any dwelling-house in the day-time, any person being therein; or shall comfort, aid, counsel or command any person to commit any of the said offenses, or to break any dwelling-house, shop or warehouse thereto belonging, and therewith used in the day-time, and feloniously to take away any money or goods to the value of five shillings, altho no person be within such dwelling-house, &c. or shall counsel, hire or command any person to commit any burglary, if they be convicted, stand mute, or challenge peremptorily above twenty."

The design of this clause was to deprive the accessories before of the benefit of the clergy; but this statute not mentioning booths nor out-houses, leaves the accessories in such cases to their clergy.

The same statute enacts, "That persons indicted for a crime, of which being convicted they should not have their clergy by any former statute, shall not have it if they stand mute, or will not answer directly, or challenge peremptorily above twenty, or be outlawed.

Persons indicted of felony for stealing of goods, &c. if convicted, stand mute, will not directly answer, or challenge peremptorily above twenty, shall lose their clergy, if it appears upon evidence or examination, that the goods were taken in another county in such a manner, whereof, if convicted by a jury of that county they should not have their clergy.

This part of the statute helps the several former acts, which were defective either as to the point of standing mute, or challenging peremptorily, or being outlawed.

By 10 & 11 W. 3. cap. 23. "All persons, who by night or by day shall in any shop, ware-house, coach-house or stable privately and feloniously steal any goods, wares or merchandizes of the value of five shillings, or more, tho such shop, &c. be not broke open, and tho the owner, or any other person be not therein, or that shall assist, hire or command any person to commit such offense,

" being thereof convict or attainted by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty, shall be excluded from the benefit of clergy.

The uses of this statute are these.

1. By the former statutes (except the case of a booth in a fair or market, by 5 & 6 E. 6.) it was necessary, in order to take away clergy, that the robbery should be in a dwelling-house, whereas this statute extends to shops, ware-houses, &c. tho they should not be adjoining to, or be any part of, a mansion-house.

2. The former statutes required there should be an actual breaking or putting in fear, otherwise it would not be a robbery, which is the stealing intended by 39 Eliz. cap. 15. as appears from the preamble of that statute; but by this statute, if the goods stolen be of the value of five shillings, the offender is ousted of clergy as to a shop, ware-house, coach-house, or stable, tho there be no breaking or putting in fear.

3. By 23 H. 8. and 1 E. 6. clergy was not taken away, unless there were some person in the house put in fear, nor by 5 & 6 E. 6. unless some of the family were in the house or booth; nor by 39 Eliz. unless it were in the day-time, and no person in the house; so that if the offense were committed when any person was in the house, if not put in fear, nor one of the family, or when no body was in the house, if it were in the night-time, in neither of those cases was clergy taken away by those statutes; but this statute takes it away in both those cases as to shops, &c.

But still this statute omitted to mention dwelling houses or out-houses, wherefore, to supply this omission, another statute was made, viz.

12 Ann. cap. 7. by which it is enacted, "That if any person shall feloniously steal any money, goods, or chattles, &c. of the value of forty shillings in any dwelling-house or out-house thereto belonging, altho it be not broken, nor any person therein, or shall assist any person to commit such offense, and shall be convicted by verdict or confession, or stand mute, or will not answer directly, or shall challenge peremptorily above twenty, he shall be debarred from the benefit of clergy.

But both these statutes seem defective as to persons outlawed.

1. Tho

1. The first is really true, namely when it is *tempus belli* within the kingdom, and one enemy either steals, robs, or plunders the house or goods of another, and therefore the book of 22 *Affiz.* 95. adds to the definition of burglary *in time of peace*, for in time of war, tho' these kinds of offenses committed by those of the same party, or those that are not in hostility one to another are felonies, yet in time of war, when done by an enemy, they put on another name, as acts of hostility, misprisions, and the like.

Jusque datum sceleri.

2. The second is only supposititious, namely when it is done in case of necessity (*y*), as a poor person that in case of necessity for hunger shall break and enter a house for victuals under the value of twelve-pence, which is added as an exception to burglary, by *Crompt. fol. 33. a.* and *Dalt. cap. 99. p. 255, 256. (z)*, for tho' I do agree a judge ought to be tender in such cases, and use much discretion and moderation, yet this must not pass for law, for then we shall in a little time let loose all the rules of law and government, and burglaries, robberies, yea murders themselves shall be excusable under pretense of necessity, and we shall fall within the wild doctrine of the *Jesuitical casuists*, who of late in *France* and elsewhere, upon those general misapplied maxims of *Quicquid necessitas cogit, defendit, and in casu extremae necessitatis omnia sunt communia*, have advised servants and apprentices, that it is lawful in point of conscience to [566] steal from their masters, or rob them in case they make them not sufficient allowances of meat, drink, or clothes: where laws are settled, there are other remedies appointed for the relief of servants against oppressing masters, and of the poor, by complaint to the magistrates without violating the established laws of kingdoms or states. (*)

4 Blackf. Com. ch. 16. p. 223, 228. Fother. 38, 39, 76, 77, 107, 108, 109. See Index to 1 Hawk. P. C. Tit. Burglary. See Burn. Edit. 1776. Tit. Burglary, per tot.

(y) See *Grot. de jur. belli ac pacis, Lib. II. cap. 2. §§. 6 & 7.*

(z) *New Edi. p. 489.*

(*) What our author here observes is undoubtedly true, that the plea of necessity ought not in such cases to be allowed, and the reason is, because the law supposes, that no man can in a well governed commonwealth be driven to such a necessity; this supposition is the more reasonable in *England*, where there are so many laws, and such large sums yearly collected for the relief of the poor, as are more than sufficient

for that purpose, if rightly applied; yet such is the neglect in the execution of those laws, that it were to be wished some expedient were found out to render that relief more speedy and effectual, lest, while the necessity be real, the relief be only supposititious, which our author himself thought was oft-times the case, notwithstanding the provisions of the law; (see his preface to his *discourse touching the provision for the poor*) which makes it reasonable it should be allowed as an argument for mercy, tho' not as a plea in justification.

C H A P. XLIX.

Of arson, or wilful burning of houses.

THE felony of arson or wilful burning of houses is described by my lord Coke, cap. 15. p. 66. to be the *malicious and voluntary burning the house of another* by night or by day.

This was felony at common law (*a*), and one of the highest nature, and therefore by the statute of *W^m. I. cap. 15.* such offenders were not repleviable (*b*); and by *Briton* (*c*) the offenders herein were burnt to death, but as to that the law is changed, they are to be hanged. *H. 1 E. 2. Coram Rege Rot. 88. Norf.* (*d*).

[567] By the statute of *8 H. 6. cap. 6.* dispersing of bills of menace to burn houses, if money be not laid down in a certain place, was made high treason, if the houses were burned accordingly: *vide Rot. Par. 15 H. 6. n. 23.* but as to the treason it is repealed by the statute of *1 E. 6. cap. 12.* and *1 Mar. cap. 1.* but the felony remains still in case the houses be burned. (*e*)

In cases of wilful burning of houses the indictment runs, *Quod felonice, voluntarie & malitiose combuscat domum* without saying *domum mansiohalem*, as in case of burglary. *Co. P. C. p. 67.*

And to examine this felony these things are inquirable, *viz.* 1. What shall be said *domus*. 2. What *domus* of another. 3. What a malicious and wilful burning. 4. What kind of felony this is. 5. Whether and how clergy is allowable.

I. What shall be said *domus*.

It extendeth not only to the very dwelling-house, but to all out-houses, that are parcel thereof, tho not contiguous to it, or under the

(*a*) *3 H. 7. 10. a.*

(*b*) *2 Co. Infit. 188.*

(*c*) *cap. 9.*

(*d*) By the laws of *Ethelflan* it was capital, *incendiarius capititis pena esto*; *vide Leg. Ethelflan. l. 6.* and by the laws of *Canute* it was one of those capital offenses for which no ransom was allowed. *Leg. Canuti, l. 61.*

(*e*) But since by the *9 Geo. I. cap. 23.* it is made felony without benefit of clergy, knowingly to send any letter without a

name subscribed, or signed with a fictitious name demanding money, venison or other valuable thing. This statute is amended by *Stat. 27. Geo. 2. c. 15.* knowingly to send any letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy.

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same roof; as in case of burglary, the barn, stable, cow-house, sheep-house, dairy-house, mill-house. *Co. P. C.* p. 67. 11 H. 7. 1. b. (f)

But if the barn or out-house be not parcel of a dwelling-house, it is not felony, unless the barn have hay or corn in it (g), and then, tho' it be no parcel of a dwelling-house, it is felony, *4 Co. Rep.* 20. a. *Barham's case*; but if the barn have only hay in it, and not corn, the offender shall have his clergy, but if it hath corn in it, he shall be excluded of clergy, tho' not parcel of a dwelling-house. *Co. P. C.* p. 69.

The burning of a frame of a house was no felony by the common law, but was made felony by the statute of 37 H. 8. [568] cap. 6. but that stands repeal'd by 1 E. 6. cap. 12. and 1 Mar. cap. 1.

The burning of a stack of corn was no felony by the common law, but the attempting of it was made felony by the statute of 3 & 4 E. 6. cap. 5. (k), but that is repeal'd by 1 Mar. cap. 1. (i)

But by the statute of 43 Eliz. cap. 13. the wilful and malicious burning of any barn, or stack of corn, or grain within the counties of *Northumberland, Cumberland, Westmorland or Durham*, is made felony without benefit of clergy. (k)

II. What shall be said the house of another.

A tenant for years of a house sets fire to his own house, thereby intending maliciously to fire the house of *B.* if he burn his own house, and also thereby burn the house of *B.* this is felony; but if he burn not the house of *B.* according to his design, but only burn his own house, this is not felony, but a great misdemeanor, for which he was set in the pillory, fined, and perpetually bound to the good behaviour, and yet it was of a house in the city of *London*, and laid that he did

(f) The words of the book are, *because the barn was adjoining to the house, it was bidden to be felony; to make which serve our author's purpose we are not to understand thereby its being contiguous, but being so near the house, as to be parcel thereof.*

(g) But by 22 & 23 Car. 2. cap. 7. "It is felony maliciously to burn in the night-time any rick or stack of corn, or hay or grain, barns or other out-houses, or buildings, or kilns whatsoever." So that now, tho' the barn be empty, it is felony; and by 9 Geo. I. cap. 22. clergy is taken away from the offender.

(h) This statute does not make the attempt felony generally, but only where diverse persons to the number of twelve are assembled for that purpose, and soon

time together for the space of an hour after proclamation to depart, or where, any above the number of two, and under twelve, shall after proclamation, as aforesaid, in a forcible manner attempt the same.

(i) But it is made felony by 22 & 23 Car. 2. cap. 7. and by 9 Geo. I. cap. 22. it is felony without benefit of clergy to set fire to any house, barn or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay or wood.

(k) By 1 Geo. 1. cap. 48. it is felony maliciously to set on fire any wood, underwood or coppice. By this statute clergy is not taken away; but by 9 Geo. I. cap. 22. it is felony without benefit of clergy to cut down or destroy any trees planted in any avenue, orchard, garden, or plantation;

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it ea intentione to burn the houses of others. *M. 10 Car. 1. B. R.*
Croke 377. Holme's case, adjudged.

III. It must be a *burning* of a house of another; therefore if *A.* sets fire to the house of *B.* maliciously to burn it, but either by some accident or timely prevention the fire takes not, this is no felony, tho' it were a malicious attempt, for the words are *incendit & combuffit*, but if he had burned part of the house, and the fire is quenched, or [569] goes out before the whole house be burned, it is felony. *Co. P. C. p. 66. Dalt. cap. 105. (l)*

It must be a *wilful and malicious* burning, otherwise it is not felony, but only a trespass.

And therefore if *A.* shoot unlawfully in a hand-gun, suppose it be at the cattle or poultry of *B.* and the fire thereof sets another's house on fire, this is not felony, for tho' the act he was doing were unlawful, yet he had no intention to burn the house thereby, against the opinion of *Dalt. cap. 105. p. 270. (m)*

But if *A.* have a malicious intent to burn the house of *B.* and in setting fire to it burns the house of *B.* and *C.* or the house of *B.* escapes by some accident, and the fire takes in the house of *C.* and burneth it, tho' *A.* did not intend to burn the house of *C.* yet in law it shall be said the malicious and wilful burning of the house of *C.* and he may be indicted for the malicious and wilful burning of the house of *C.* *Co. P. C. p. 67. (n)*

An infant of about fourteen years of age or under may be guilty of malicious burning of houses, if by circumstances it can appear he knew it to be evil.

Before me at *Norfolk*, a boy about the age of fourteen years was arraigned upon two several indictments for malicious and wilful burning of two several houses, the first was his own father's, and it appeared, that, when he had secretly carried fire into the barn and fired it, he falsely charged another with the fact, and upon the boy's accusation he was imprisoned, till it appeared clearly he was not the offender: this boy was afterwards together with his father and his other children entertained at a neighbour's house in charity, and the boy watching an opportunity, when none were in the house but a child in the cradle, carried fire out of the kitchen into a room of furzes, and set fire in it and went out, and thus burnt a second house, and

(l) *New Edit. p. 506.*
(m) *Ibid.*

(n) See the case of *Coke and Woodburne*,
State Tr. Vol. VI. p. 212.

the child in the cradle; for both these he was questioned, and at length confessed freely the whole circumstances of both facts, he was indicted, and upon his arraignment pleaded, and upon his trial craftily insisted, that he was under fourteen years [570] of age; but I directed the jury, that it appeared by the circumstances, that his malice supplied his age, for it appeared, that he understood the evil of the first offense when he did it so secretly, and yet charged another wrongfully; but if there had been any doubt of the first burning, yet he could not but be consonant that the second burning was a great crime, when he saw another formerly charged by him with the first burning committed as for felony; but yet for my farther satisfaction, and in respect the boy seemed very little, I took farther examination touching his age, and his father, being by, freely confessed and was content to swear, that he was above fourteen and near fifteen years of age, and he was convicted and executed.

IV. What felony this is.

And it seems unquestionable, that the burning of a dwelling-house, or any part thereof, or any out-house part thereof, was a felony at common law, and so was also the burning of a barn with hay or corn in it, tho not parcel of a dwelling-house, but standing at a distance. *Co. P. C. p. 67. 11 H. 7. 1. b.*

V. But as to the point of the not allowance of clergy therein, there may be some matters to be examined: certain it is, that at this day clergy is not allowable to a party convicted of wilful and malicious burning of a dwelling-house, or of a barn with corn; *quod vide 11 Co. Rep. 34. Poult's case adjudged per omnes Justic. Plow. Com. 475. Co. P. C. p. 67.* and the constant practice hath been to deny clergy to those convict of this crime; *quod vide* in the resolution of *Poult's case.*

And the statute of 4 & 5 P. & M. cap. 4. takes away clergy from all accessaries before to the offenses of wilful burning any dwelling-house, or of any barn then having corn or grain in the same; and surely they took the law to be, that the principal was by law ousted of his clergy, or otherwise they would not have ousted the accessory of his clergy.

But then the question remains, what it was that ousted the principal of his clergy.

By the statute of 23 H. 8. cap. 1. clergy was ousted from all persons found guilty of wilful burning of any dwelling-houses [571]

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houses or barn, wherein any grain or corn should happen to be, and from all persons found guilty of abetting, aiding or counselling thereof, *viz.* accessaries before; except persons in order of subdeacon, or above.

The statute of 1 E. 6. cap. 12. as to divers offenses therein particularly mentioned, which are for the most part also included in the statute of 23 H. 8. carried the exclusion of clergy farther, *viz.* as to standing mute, or not directly answering, but mentions not at all wilful burning of houses, or barns with grain; and enacted, that in all other cases of felony persons indicted shall have their clergy, as they should have had before 1 H. 8.

So that by the act of 1 E. 6. clergy was restored to burning of houses and barns with corn, notwithstanding the statute of 23 H. 8. or any other statute made since the first year of Henry VIII. and if the ousting of the principal in arson from his clergy rested upon the statute of 23 H. 8. then the statute of 1 E. 6. had restored him to his clergy.

The solution therefore of this matter is upon two accounts.

1. Some have thought that the wilful burning of hotties was not within clergy by the common law, nor by the statute of 25 E. 3. cap. 4. because it was an hostile act (^(o)), and therefore, as until the statute of 4 H. 4. cap. 2. *Infidatores viarum & depopulatores agrotum* joined with another felony, and so found, were ousted of their clergy, because favouring of acts of hostility, so *incendiatores domorum* were even by the common law ousted of clergy before the statute of 23 H. 8. and so are not restored to clergy by the general clause of the statute of 1 E. 6. and this I remember was delivered as the reason of the exclusion of clergy from wilful burning by Mr. Attorney Noy, 8 Car. 1 in the king's bench, and seemed to be assented to by the court.

But I think this will hardly help the matter, 1. Because tho' possibly [572] clergy might not be allowed at common law to wilful burning, yet the statute of 25 E. 3. cap. 4. *pro clero* extends clergy to all treasons and felonies touching other persons than the king himself, and his royal majesty. 2. Because then as well a burning of a barn with hay, as a barn with corn, would be excluded from clergy, for the one is as hostile as the other.

(o) And so interpretatively of felony touching the person of the King himself, which by that statute was ousted of clergy.

2. Others have thought that the statute of 4 & 5 P. & M. cap. 4. taking away clergy from the accessaries before, doth take away by necessary consequence the clergy from the principal, for it were not reason to think the accessary *before*, should be in a worse condition, than the principal offender, and therefore virtually and implicatively, and by necessary consequence it takes away clergy from the principal in all those cases, where it takes it from the accessary *before*; and besides, if the principal had his clergy, the accessary could not be arraigned, and this I think is true, tho' this case needs not this help.

But I think, and so is the book of 11 Co. Rep. 34, 35. that the statute of 25 H. 8. cap. 3. which extends to take away clergy in all those cases which were within 23 H. 8. cap. 1. and particularly recites that of burning houses and barns with grain, and farther extends that exclusion to standing mute, not directly answering, challenging above twenty, I say that statute of 25 H. 8. was in great part repealed by the statute of 1 E. 6. and is entirely revived by the statute of 5 & 6 E. 6. cap. 10. not only as to the point of ousting clergy upon examination (*p*), but also as to the exclusion of clergy in those cases mentioned in the act of 25 H. 8. wherein burning of houses and barns with corn is expressly mentioned, so that consequently this statute of 5 & 6 E. 6. reviving the statute of 25 H. 8. repeals the generality of that clause in 1 E. 6. whereby clergy was *let in*, in all cases there not enumerated.

And consequently the periods of this case of clergy [573] in wilful burning stand thus.

1. Before 23 H. 8. clergy was allowable therein by force of the statute of 25 E. 3. *pro clero.*

2. After 23 H. 8. until 25 H. 8. clergy was allowable for the accessary in all cases, and for the principal in all cases, but finding him guilty.

3. After 25 H. 8. until 1 E. 6. clergy was taken away from the

(p) This relates to the second clause of the 23 H. 8. cap. 3. whereby it is provided that if any persons be indicted in one county for stealing goods in another, and stand mute, or challenge peremptorily above twenty, or will not directly answer, they shall be put from their clergy in like manner, as if they had

been tried and found guilty in the same county, where the offence was committed, if it appear to the justices by the evidence or on examination, that it was such a felony, as if found guilty thereof in the county where committed, they would have lost their clergy by the 23 H. 8. cap. 1.

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principal as well where he stands mute, not directly answers or challenges above twenty, as where he is found guilty.

But the accessaries as well before as after were to have clergy.

4. After 1 E. 6. till 5 & 6 E. 6. when the statute of 25 H. 8. was revived, both principal and accessaries had their clergy in all cases of burning.

5. After 5 & 6 E. 6. till 4 & 5 P. & M. cap. 4. the principal was excluded in all cases, wherein he was excluded by the statute of 25 H. 8. as well where he stood mute, challenged above twenty, did not directly answer, as where found guilty. (q.)

But the accessaries *before*, as well as *after*, had their clergy.

6. By the statute of 4 & 5 P. & M. cap. 4. until this day, accessaries *before* are excluded of clergy in all cases, but accessaries *after* have their clergy.

But yet there still remain two doubts.

1. Whereas the statute of 4 & 5 P. & M. cap. 4. extends to oust clergy from the accessary, as well if he be attainted as convicted, and consequently if outlawed, he shall not have clergy, because it is an attainder; the statute of 25 H. 8. extends only to finding guilty, challenging above twenty, standing mute, or not directly answering, and it seems in attainder of the principal by outlawry he shall have his clergy; therefore *quære*, whether an attainder by outlawry ousts the principal of clergy upon the statute of 23 or 25 H. 8.

2. Whereas the statute of 4 & 5 P. & M. cap. 4. hath [574] no exception of persons in the order of sub-deacon; but accessaries *before* are ousted of their clergy in all cases by that statute, tho in orders.

Yet by the statute of 25 H. 8. which is relative to the statute of 23 H. 8. principals in the order of sub-deacon, or above, have their clergy in the case of arson, for by the statute of 23 H. 8. clergy is saved to men in orders, where found guilty; and by the statute of 25 H. 8. in cases of standing mute, &c. they are ousted of their clergy as if found guilty, in which case men in orders had their clergy, and so the reviving of the statute of 25 H. 8. by that of 5 & 6 E. 6. lets in men in orders to their clergy in case of arson, which seems to make this absurdity, that the principal in arson shall have the benefit of clergy if in orders, but the accessaries *before*, the

(q) By 3 & 4 W. & M. clergy is taken away in case of outlawry alia.

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in orders, are excluded by the general panning of the act of 4 & 5 P. & M.

And herein there will arise a difference as to men in orders, in relation to the benefit of clergy, between the case of being principal in wilful burning of houses, and the case of being principal in robbery in or near the highway, or robbing in a dwelling-house, putting the dweller in fear, or murder of malice prepense; for the act of 1 E. 6. cap. 12. excludeth them from their clergy generally without exception of men in orders, tho' they were excepted by the statutes of 23 and 25 H. 8.

But this statute of 1 E. 6. making no mention of burning of houses, the exclusion of them from clergy, if resting upon the statute of 25 H. 8. revived by 5 & 6 E. 6. excepts them.

Foster. 113.—116. 192. 333. 384. 1 Hawk. P. C. ch. 39. Sec: 1, 2, 3, &c. See 4 Black. Com. Index. Tit. Arson.

C H A P. L.

[575]

Concerning felonies by the common law, relating to the bringing of felons to justice, and the impediments thereof, as escape, breach of prison, and rescue; and first touching arrests.

I COME now, according to the method propounded; to consider those felonies that relate to the public justice of the kingdom in bringing malefactors to their due punishment, and the impediments thereof, and they are principally three, *viz.* 1. By the party arresting or imprisoning, as voluntary escapes. 2. By the party arrested, and imprisoned, as breach of prison. 3. By a stranger, as rescue of felons.

And in this order I shall examine these offenses; but as a necessary preliminary therunto, I shall first consider of arrests and imprisonment for capital offenses, by whom it may be done, and where lawful.

Arrests of malefactors are of two kinds, 1. Either by persons thereto by law deputed, or 2. By private persons.

And the former is again of two kinds. Either, 1. By process of law, or 2. *Virtute officii.*

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The former again is of two kinds, 1. Either by process in the king's name, 2. Or by warrant in the name of a judge or justice thereunto authorized, and that either in writing or *ore tenus*.

I shall pursue this order, and

I. Shall begin with the first of these, namely, arresting by virtue of the king's writ.

Regularly no process issues in the king's name and by his writ to [576] apprehend a felon or other malefactor, unless there be an indictment, or matter of record in the court upon which the writ issues.

Antiently the process upon an appeal or an indictment of felony was only one *Capias*, and thereupon an *Exigent*. 22. *Affiz.* 81.

By the statute of 25 E. 3. cap. 14. there are to be a *Capias* and an *Alias* with a command to the sheriff to seize the goods of the felon, and then an *Exigent*.

But it should seem by the book of 8 H. 5, 6. that this statute extended not to felony of death, but that there should be only one *Capias*, and then an *Exigent*.

But by the statute of 6 H. 6. cap. 1. if *A. de B. in comitatu S.* be indicted in the king's bench in *Middlesex*, there shall go out one *Capias* into *Middlesex*, another into *S.* and each shall have six weeks at least between the *Testate* and return, and upon *Non inventus* returned then an *Exigent*.

But if he be not named of another county, then it seems only one *Capias* shall issue, where the party is indicted, and upon that an *Exigent*: this statute was made during the king's pleasure; but by the proviso in the statute of 8 H. 6. cap. 10. it seems to be made perpetual.

By the statute of 8 H. 6. cap. 10. if *A. de B. in com. S.* be indicted or appealed in com. *W.* before justices assigned, there shall go out first a *Capias in Com. W.* and upon *Non inventus* returned a *Capias*, with proclamations in com. *S.* having three months at least between the *Testate* and return, or otherwise no *Exigent* to issue; but the process in the king's bench is excepted.

But this statute only extends, where the party is indicted in another county, than where conversant.

By the statute of 5 E. 3. cap. 11. justices of *oyer* and *terminer* may issue process against felons in a foreign county, and these processes ought, or at least may and are most fit to issue in the king's name under

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under the *Teste* of the chief judge, for which purpose all clerks of assizes have a special seal, and issue their process in the king's name in case of felony, where they go to the outlawry, tho' some other warrants are made in the name of the judge.

And in all cases the king's writs are directed to the sheriff, [577] and he executes the writ himself, or by his warrant under seal to the bailiffs.

And upon these writs the sheriff or his bailiff may break open doors to take the offenders, for they are for the king and preservation of the peace, and therefore include a *non omittas propter aliquam libertatem*; *quod vide 5 Co. Rep. 92. a.*

- And in this case the sheriff or his bailiff may require any persons present to assist him in execution of the writ, and he that refuseth to assist him, is indictable and punishable by fine and imprisonment.

II. The second kind of arrest is by warrant under the seal of the justices thereunto authorized, as justices of *oyer* and *terminer*, or of gaol-delivery, or justices of peace.

And herein these things are considerable: I. What are the essentials of such a warrant, without which it is void in law. 2. Who may grant a warrant to apprehend a felon. 3. To whom, and 4. In what order or method it is to be granted, or 5. Executed, and in what case.

1. As to the first of these,

It is necessary that such warrant express the name of the party to be taken: for a warrant granted with a blank and sealed, and after filled up with the name of the party to be taken is void in law. *Dalt. cap. 117. p. 329. (a)*

It must be under seal, tho' some have thought it sufficient if it be in writing subscribed by the justice, *Dalt. cap. 117. p. 358. vide 2 Co. Inst. supra statutum de frangentibus prisonam, p. 591.* and the failing in these things will make the warrant void, and subject the officer to a false imprisonment; tho' in some cases the want of due formality may be blameable in him that makes the warrant, yet it will not therefore subject the officer to a false imprisonment, if the matter be within the jurisdiction of him that makes it; as for instance.

A warrant by a justice to apprehend *J. S.* to answer such matters

(a) *New Edit. p. 574*

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as shall be objected against him, *ex parte domini regis*, without expressing the certainty of the crime, this is not regular, *Lambard's justice* 95, 96. 2 *Co. Instit.* 591. 615. tho Mr. *Dalt. cap. [578] 117. p. 329.* gives instances of such warrants granted by *Popham* chief justice.

And therefore, if before commitment a person so apprehended should be removed into the king's bench by *Habeas Corpus* upon such a warrant, or should be committed upon such a general *Mittimus*, he should be discharged; or in case he should be rescued upon such an apprehension by such a warrant, or be voluntarily let go by him that apprehends him, (tho it may be the true cause of the warrant were felony,) yet it not being expressed in the warrant, such an escape or such a rescue would not be felony.

Yet it may excuse the officer in false imprisonment, if the true cause were felony, or any misdemeanor within the cognizance of him that makes the warrant, for it is but an erroneous, not a void warrant, and it is not reasonable to suppose the officer should be consonant of the formalities of law, or advise with counsel upon all occasions, whether the warrant were in strictness of law regular, especially in such a case where the error of this nature hath been seconded with common practice; but of this more hereafter.

2. As to the persons, that may grant a warrant for apprehending a felon.

The chief justice of the king's bench or any other judge of that court may issue a warrant in his own name, for the apprehending and bringing before him any person touching whom oath is made of a felony committed, or of suspicion of felony upon him, into any county of *England* and *Wales*, for they are intrusted with the conservation of the peace through all *England*, and are more than justices of peace or *oyer and terminer*; and this hath been usual in all ages.

But to avoid the trouble to the country in bringing up offenders they usually direct their warrants to apprehend the parties, and bring them before some justice of peace near adjoining, either to be examined or bound over to the sessions, and farther to be proceeded against according to law.

And thus their warrants ought to run in cases of surety of the peace or good behaviour against a person in another county, than where they are, by reason of the statute of 21 *Jac. cap. 8.*

Justices

Justices of *oyer* and *terminer* may also issue their warrants in the counties within their commission for apprehending felons or other malefactors, or for *sûrtey* of the peace within their limits; *quærer*, whether they may not issue their warrants for any indicted of felony within their precincts, tho they are abroad in a foreign county, by the statute of 5 E. 3. before mentioned?

Justices of peace may also issue their warrants within the precincts of their commission for apprehending persons charged of crimes within the cognizance of the sessions of the peace, and bind them over to appear at the sessions, and this, tho the offender be not yet indicted.

And therefore the opinion of my lord *Coke*, 4 *Instit.* 177. is too strait-laced in this case, and, if it should be received, would obstruct the peace and good order of the kingdom; and the book of 14 H. 8. 16. upon which he grounded his opinion, was no solemn resolution, but a sudden and extrajudicial opinion, and the defendant had liberty to mend his plea as to the circumstance of time, to the end it might be judicially settled by demurrer, which was never done; and the constant practice hath obtained contrary to that opinion; *quod vide Dalt. cap. 117. (b)*

And whereas my lord *Coke*, *ubi supra*, saith also, that a justice of peace upon oath made by *A.* of a felony committed, and that *A.* suspects *B.* and shews his cause, cannot issue a warrant to bring *B.* before him for further examination, and thereupon commit or bind him over to the assizes or sessions, because it must be the proper suspicion of *A.* himself, and *A.* may arrest him upon the score of his own suspicion, but not by warrant of the justice; I think the law is not so, and the constant practice in all places hath obtained against it, and it would be pernicious to the kingdom if it should be as he delivers it, for malefactors would escape unexamined and undiscovered; for a man may have a probable and strong presumption of the guilt of a person, whom yet he cannot positively swear to be guilty.

Therefore I think, that if *A.* makes oath before a justice of peace of a felony committed in fact, and that he suspects *B.* and shews probable cause of suspicion, the justice may grant his [580] warrant to apprehend *B.* and to bring him before him, or some other justice of peace to be examined, and to be farther proceeded against,

(b) *New Edit.* p 576.

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as to law shall appertain; and upon this warrant the constable, or he to whom the warrant is directed, may arrest him, and if occasion be may break doors to take him, if within a house, and will not upon demand render himself, as well as if it were an express and positive charge of felony sworn by *A.* against him, and so hath common practice obtained notwithstanding that opinion: *vide Statute Westm. 1 cap. 15. (c), 13 E. 4. 9. a.*

But a general warrant upon a complaint of a robbery to apprehend all persons suspected, and to bring them before, &c. was ruled void, and false imprisonment lies against him that takes a man upon such a warrant, *P. 24 Car. 1.* upon evidence in a case of justice *Swallow's* warrant before justice *Roll.*

If *A.* hath committed treason, tho the justices of the peace have no cognizance of it as treason, yet they have cognizance of it as a felony, and as a breach of the peace, and therefore a justice of peace upon information upon oath may issue his warrant to take him, and may take his examination, and commit him to prison.

A. commits a felony in the county of *B.* and then goes into the county of *C.* upon information given to a justice of peace of the county of *C.* he may issue his warrant to take him, may take his examination, and commit him to gaol in the county of *C.* from whence he may be removed by *Habeas Corpus* to the county of *B.* for his trial.

If *A.* commit a felony in the county of *B.* and upon a warrant issued against him by a justice of peace in the county of *B.* he is pursued and flies into the county of *C.* and there is taken, he must not by virtue of that warrant be carried to a justice of peace of the county of *B.* where he committed the felony, but to a justice of peace in the county of *C.* where he was taken.

But if *A.* were taken by the warrant in the county of *B.* and break [581] away into the county of *C.* and be there taken upon fresh suit by them that first took him, he may be either brought to a justice of the county of *C.* where he was last taken, or before the justice of the county of *B.* by whose warrant he was first taken; for in supposition of law he was always in custody: *vide dubitatur 13 E. 4. 9. a.*

If *A.* be in commission of the peace in the county of *B.* and happen to be in the county of *C.* and there complaint is made to him of

a felony in the county of *B.* where he is in commission, as he cannot issue a warrant out to apprehend the party, so neither can he imprison in the county of *C.* because an act of jurisdiction, but he may take an oath of a party robbed in pursuance of the statute of 27 Eliz. or he may take an examination, or information, or recognizance in a foreign county, but cannot compel them by imprisonment. *P. 7 Car. 1. Croke, n. 3 Helyar's case (d), Dalt. cap. 6. and 117. (e)*

But if *A.* be a justice of peace in two adjacent counties, tho by several commissions, as the recorder of *London* is, nothing is more usual for him, that whilst he lives in one county to send his warrants to apprehend malefactors in another, and to send them to *Newgate*, which is the common gaol of both counties, *London* and *Middlesex*.

3. Touching the persons to whom a warrant may be directed.

The justice that issues the warrant, may direct it to a private person if he please, and it is good; but he is not compellable to execute it, unless he be a proper officer. *14 H. 8. 16. Dalt. cap. 117. p. 332. (f)*

The warrant is ordinarily directed to the sheriff or constables; and they are indictable, and subject thereupon to a fine and imprisonment if they neglect or refuse it.

If directed to the sheriff, he may make a warrant to his bailiff to execute it.

If to a constable, tithing-man, &c. he must execute it himself, and may not substitute another; but he may call any persons to assist him, and they are bound to assist him, and are indictable if they neglect or refuse to assist: *vide Dalt. ubi supra.*

If directed to the constable of *D.* he is not bound to execute the warrant out of the precincts of his constablewick, [582] but if he doth it out of his constablewick, it is good; and so it was ruled in *Norfolk* in an action of trespass.

4. Touching the order in granting it.

1. It is convenient, tho not always necessary, to take an information upon oath of the person that desires the warrant, that a felony was committed, that he doth suspect or know *J. S.* to be the felon; and if suspected, then to set down the causes of his suspicion.

2. If the charge of the felony be positive and express, then it is fit to bind the party by recognizance to prosecute, before the warrant be issued.

(d) *Cro. Car. 211.* (e) *New Edit. p. 25 & 575.* (f) *New Edit. p. 577.*

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But if it be only a charge of suspicion, and the business requires farther examination, then it is neither necessary nor fit to bind over the party to prosecute; for possibly upon the bringing in of the party accused, and farther examination of the fact, there may be cause to discharge him, and thus I think Mr. Dalton to be intended, cap. 117. p. 334. (g), the case before chief justice Flemming.

3. The warrant may issue to bring the party before the justice that granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justices of the county he thinks fit, and not in the election of the prisoner, 5 Co. Rep. 59. b. Foster's case.

5. Touching the demeanor of the officer in executing the warrant.

If it be a warrant for felony, or a warrant for the surety of the peace, the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door, tho the party be not indicted; and this is the constant practice against the opinion of my lord Coke, 4 Inst. 177. quod vide Dalt. cap. 117. p. 333. (h)

[583] And so it is if the warrant be only upon suspicion of felony, as hath been said before, for in both cases the process is for the king, and therefore a *Non omittas* is implied, and he that diligently considereth the statute of West. 1. cap. 15. (i), and the statute of 2 & 3 P. & M. cap. 10. will find that an imprisonment may be made by the justice, as well for suspicion of felony, as for an absolute charge of felony, and that as well before indictment as after.

And by the book of 13 E. 4. 9. a. A man that arrests upon suspicion of felony, may break open doors, if the party refuses upon demand to open them, and much more may it be done by the justice's warrant.

If the officer be demanded he must shew his warrant, but if he doth it *virtute officii* as a constable, &c. it is sufficient to notify that he is the constable, or that he arrests in the king's name. Dalt. ubi supra, 6 Co. Rep. 54. a. 9 Co. Rep. 69. a. Mackally's case.

Lastly, What is to be done after the warrant served, and when the person accused is brought before the justice thereupon.

(g) New Edit. cap. 169. p. 579. (b) New Edit. p. 578. (i) 2 Co. Inst. 185.

- If there be no cause to commit him found by the justice upon examination of the fact, he may discharge him.

If the case be bailable, he may bail them.

If he have no bail, or the case appears not to be bailable, he must commit him.

And being either bailed or committed, he is not to be discharged till he be convicted or acquitted, or delivered by proclamation. *C. P. C.* cap. 100. p. 209.

And this leads me to the *Mittimus*, or the warrant to the gaoler to receive him; and this is the ground of the felony in case of a breach of prison.

My lord Coke, 2 *Inst.* 591. makes three essential parts of the *Mittimus*.

1. That it be in writing sealed by the justice that commits, and without this part the commitment is unlawful, the gaoler is liable to a false imprisonment, and the wilful escape by the gaoler, or breach of prison by the prisoner, makes no felony.

But this must not be intended of a commitment in a court [584] of record, as the king's bench, gaol delivery, or sessions of the peace, for there the record itself, or the memorial thereof, which may at any time be entered of record, are a sufficient warrant without any warrant under seal.

2. That it express the cause for which he is committed, namely felony, and what kind of felony.

This seems requisite to make the voluntary escape or breach of prison felony, and also it is necessary upon return of the *Habeas Corpus* out of the king's bench, because that is in nature of a writ of right or writ of error to determine, whether the imprisonment be good or erroneous.

But it seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony.

And also upon such a general warrant without expressing any felony or treason, or surety of the peace, the constable cannot break open a door. *T. 9 Jac. B. R. 1 Bulstrode 146. Fother's case.*

3. That it have an apt conclusion, viz. *There to remain till delivered by law.*

But if the conclusion be irregular, I think it makes not the warrant void, but the law will reject that which is surplusage, and the rest shall stand.

And

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And therefore if the cause be expressed, and the conclusion irregular, as *till farther order given by a justice*, yet a breach of prison under such a warrant will be felony, yea, if the party be removed by *Habeas Corpus*, tho the conclusion be irregular, yet if the matter appears to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged; but the idle conclusion shall be rejected.

And therefore I do think that such a warrant is a good justification in a false imprisonment, tho the right conclusion be omitted, or tho the wrong conclusion be inserted, if the matter of the *Mittimus* be otherwise sufficient to charge him in custody, and therefore it is a lawful warrant notwithstanding the omission or incongruity of [585] the conclusion, so as to make the voluntary permission of an escape or the breach of prison felony.

By the Statute of 23 H. 8. cap. 2. the felons are to be sent to the common gaol (i); and by the Statute of 4 E. 3. cap. 10. the sheriffs and gaolers are bound to receive them, whether committed by justices, or attached *ex officio* by constables.

Previous to the commitment of felons, or such as are charged therewith, there are required three things, 1. The examination of the person accused, but without oath. 2. The farther information of accusers and witnesses upon oath. 3. The binding over of the prosecutor and witnesses unto the next assizes or sessions of the peace, as the case requires.

1. The examination of the person accused, which ought not to be upon oath, and these examinations ought to be put in writing, and returned or certified to the next gaol delivery or sessions of the peace, as the case shall require, by the Statute of 2 & 3 P. & M. cap. 10. and being sworn by the justice or his clerk to be truly taken, may be given in evidence against the offender. (k)

(i) *And not elsewhere*; so that it should seem that commitments to *New Prison* or the *Gate-house* are irregular; see 2 Co. Inf. 43. Cro. Eli. 830. and of this opinion was chief justice Holt, in the case of *Kendal and Roe*, State Tr. Vol. IV. p. 862. See also 5 H. 4. cap. 10. which ordains, "That none be imprisoned by justices of the peace, save only in the common gaol." 9 Co. Rep. 119. b.

(k) Altho they be not evidence against any other person named in them; it was

therefore very irregular in the chief justice to refuse reading the examinations of *Stans* and *Borofki* at their trial; see State Tr. Vol. III. p. 470. But *quare* by sergeant *Wilson*, if the chief justice was not right in such refusal? For by the opinion of some judges now living, the statute doth not extend to the examination of the party accused, upleas he signed his examination, but only to the witnesses or persons accusing,

And

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- And in order thereunto, if by some reasonable occasion the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable, or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for farther examination ; and this detainer is justifiable by the constable, or any other person without shewing the particular cause for which he was to be examined, or any warrant *in scriptis.* *T. 37 Eliz. Rot. 244. B. R. Broughton and Marshaw.* (l)

But the time of the detainer must be reasonable, therefore [586] a justice cannot justify the detainer of such a person sixteen or twenty days in order to such examination. (m)

2. He must take information of the prosecutor or witnesses in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, &c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

3. Before he commit the prisoner, he is to take surety of the prosecutor to prefer his bill of indictment at the next gaol delivery or sessions, and likewise to give evidence ; but if he be not the accuser, but an unconcerned party that can testify, the justice may bind him over to give evidence ; and upon refusal in either case may commit the refuser to gaol. *Stamf. P. C. p. 163. a. Dalt. cap. 116. p. 326.* (n), 2 & 3 P. & M. cap. 10. and *Dalt. cap. 20. p. 55.* (o)

And thus far of arrests by warrant in writing.

Next come to be considered arrests by command *ore tenus*, or by order.

The chief justice, or other justice of the king's bench, may command *ore tenus* the marshal or any of his deputies, commonly called tipstaves, to arrest any person, and such command is a good justification in false imprisonment brought ; altho 1. It be not in writing. 2. Altho no cause is expressed in the command, but only generally to answer such things as shall be objected against him *ex parte domini regis.* 3. Altho the command be *ita quod habeas corpus coram capitali justificario, &c. quandocunque, &c.* for it shall be intended, when the party complains. 4. Altho the defendant declares not in his justification what he did with him in the mean time. *P. 11 Car. B. R. Throgmorton and Allen,* adjudged upon a demurrer. (*)

(l) This case is reported in *Moore* 408. exceed three days.
by the name of *Broughton and Marshaw.*

(m) See the case of *Savage and Tait-*
ham, Cr. Eliz. 82q. where it was ad-
judged, that the time of detainer must not

(n) *New Edit. cap. 168. p. 572.*

(o) *New Edit. cap. 40. p. 106.*

(P) *2 R. A. p. 558.*

Altho,

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Altho, as hath been said, a justice cannot grant a warrant to apprehend all persons suspected, but must name their names, yet I have known in the King's bench upon a riot committed in the [587] night by persons disguised, and whose names have not been known, the court hath made an order to apprehend persons that the party, who was injured, suspects, and to bring them into the court to be examined, and such order of the court is a good warrant for the sheriff or constable to do it; but what is thus done in the highest court of ordinary justice, is not to be a pattern for particular justices or inferior jurisdictions.

I have now done with arrests by writs or warrants.

I come in the next place to arrests, *ex officio*, without any warrant.

If an affray be made in the presence of a justice of peace, or if a felon be in his presence, he may arrest him, and detain him *ex officio* till he can make a warrant to send him to gaol, but then the warrant must be in writing to the gaoler, *P. 23 Car. B. R. Sandford's case*, and so he may by word command any present to arrest. *Dale. cap. 117. p. 328. (p)*

A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of peace.

So if *A.* be dangerously hurt, and the common voice is, that *B.* hurt him, or if *C.* therupon comes to the constable, and tells him that *B.* hurt him, the constable may imprison him till he knows whether *A.* dies or lives, *T. 43 Eliz. B. R. Dunbleton's case*; or can bring him before a justice.

So if a felony be committed, and *A.* acquaints him that *B.* did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace.

But if there be only an affray, and not in view of the constable, it hath been held, he cannot arrest him without a warrant from the justice; but it seems he may to bring the offender before a justice, tho' not compellible.

Lastly, I come to the authority of every private person in relation to arrests of felons.

If *A.* commit a felony, *B.* who is a private person, may arrest him for that felony without any warrant; nay farther, if *A.* will not suffer

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himself to be taken, but either resists or flies, so that he cannot be taken unless he be slain, if *B.* or any in assistance in that case of necessity kills him, it is no felony; *de quo antea*, p. 481.

If *A.* commit a felony in the sight of *B.* and *B.* uses not his best endeavours to apprehend him, or to raise hue and cry upon him, it is punishable by fine and imprisonment. *Co. P. C.* p. 53.

If *A.* strike *B.* dangerously in the presence of *C.* *C.* may justify the imprisoning of *A.* till he can bring him before a justice, or deliver him to the constable, tho' it be not felony till death.

If a hue and cry be levied upon a felony, and come to the town, *B.* the constable, and those of the town are bound to apprehend the felon if in the town, or if not in the town, then to follow the hue and cry, otherwise they are punishable upon an indictment. *Co. P. C.* cap. 52.

If the constable in pursuit of a felon require the aid of *F. S.* he is bound by law to assist him, and is finable for his neglect. (q)

If a felony be committed in fact, and *A.* suspects *B.* did it, and hath probable cause of suspicion, *A.* may arrest *B.* for it, and justify it in an action of false imprisonment. 2 E. 4. 8. 6.

The causes of suspicion are many, as common fame finding goods upon him, and many thote, *de quibus vide Duk.* cap. 118. (r)

If a felony be committed, and *A.* suspects *B.* and *B.* being in his house refuse to open the doors, or render himself, it seems *A.* may break open the doors to take him; and so may the constable, if *A.* acquaint him therewith, especially if *A.* be present, 13 E. 4. 9. a tho' (as hath been said) my lord *Coke*, 4 Inst. 177. be to the contrary; yet the common practice and opinion hath obtained in that case against my lord *Coke*, *Duk.* cap. 98. p. 249. (f), cap. 78. p. 204. (t), 7 E. 3. 16. b.

There are special cases where a constable having received information of the misdemeanors following, or any private person [589] without a warrant may arrest and break open doors to arrest if they within refuse to open them upon demand, or to deliver up the party.

1. Where a felony or treason is committed, and the offender is within the house.

(q) 13 H. 7. 10. b.
(r) New Edit. cap. 1702

(f) New Edit. p. 482.
(t) New Edit. p. 426.

2. Where

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2. Where a felony or treason is committed, and a man suspects *J. S.* who is in the house, and hath probable cause of such suspicion. tho the party be not indicted. 7 E. 3. 16. b. 13 E. 4. 9. a.

3. Where *A.* hath dangerously wounded *B.* and then *A.* flies into the house, whether it were done in the presence of the constable, or him that arrests, or not. 7 E. 3. 16. b. *Crompt.* 171. a.

4. Where there is an affray made in a house, and the doors are shut, and are refused to be opened, during such affray the constable or any other may break open the doors to preserve the peace, and prevent blood shed; but after the affray, it cannot be done without a warrant, unless a man be dangerously wounded or killed in the affray.

Yet to avoid question in these cases, it is best to obtain the warrant of a justice, if the time and necessity will permit.

When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

1. He may carry him to the common gaol, 20 E. 4. 6. b. but that is now rarely done.

2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, *vide* 4 E. 3. cap. 10. or to a justice of peace to be examined, and farther proceeded against as case shall require. 10 E. 4. (a) 17 b.

3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

[590] And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe because a gaoler will expect a *Mittimus* for his warrant of detaining.

And thus far of arrests.

See Burn. Edit. 1776. Tit. Arrest. per tot. and 1 Hawk. P. C. ch. 12, 13, 14. and 4 Blackf. Com. ch. xxi. p. 289. ch. xxii. p. 300. &c. Fother 136, 320.

(a) This is the same year with 49 H. 6. and is so printed in the year-book.

C H A P. LI.

Of felony by voluntary escapes, and touching felony by escapes of felons.

HAVING in the former chapter said somewhat of arrests, it remains that somewhat be said touching those felonies that relate to the escape of persons arrested or imprisoned.

And these escapes are of three kinds, 1. By the person that hath the felon in his custody, and this is properly an escape; and 2. When the escape is caused by a stranger, and this is ordinarily called a rescue of a felon. 3. By the party himself, which is of two kinds, *viz.* 1. Without any act of force, and this is a simple escape. 2. With an act of force, *viz.* by breach of prison.

As to the *first*, touching an escape suffered by the person that hath a felon in custody, which is properly an escape; and this is of two kinds, voluntary and negligent.

And *first* concerning the *voluntary escape*.

A voluntary escape is when any person having a felon lawfully in his custody voluntarily permits him to escape from it, or go at large, and this is felony in case the person be imprisoned for felony, and treason in case the person be imprisoned for treason; for [591] the latter enough hath been said before; touching the former in this place.

And altho Mr. Stamford. Lib. I. cap. 26, 27, 28, 29, 30, 31. hath collected almost all that can be well said in this case, yet I shall proceed distinctly herein.

And therein I shall as near as I can observe this order.

1. I shall consider who shall be said a felon, whose escape makes a felony in him that voluntarily suffers it. 2. What shall be said a having of such a felon in his custody. 3. Who shall be said a person lawfully having such a felon in his custody. 4. What shall be said a voluntary escape of such a felon out of his custody. 5. Who shall be said voluntarily to suffer such a felon to escape. 6. What is the offense of such a voluntary permission of an escape, and where, and how punishable.

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And tho I apply these particulars to a voluntary escape, yet many of them are applicable unto, and useful for the learning of a negligent escape.

I. Who shall be said a felon, whose voluntary escape is felony in him that so permits it.

If *A.* gives *B.* a mortal wound, and before *B.* dies the constable takes *A.* into custody, either with or without a justice's warrant, and then lets him voluntarily escape before *B.* is dead, and then *B.* dies tho as between *A.* and *B.* or *A.* and the king, this is a felony from the stroke given, and the attainer of *A.* as to the forfeiture of his lands relates to the stroke; yet this is no felony in the constable, but only a misdemeanor punishable by fine and imprisonment. 11 H. 4. 12 b. *Plowd. Com.* 258. *b.*

If *A.* be indicted for felony, and taken by *Capias*, or by the warrant of a justice, or by the constable &c. and committed to prison, and he gaoler suffers *A.* to escape voluntarily, this is the escape of a felon, tho *A.* be not attainted at the time of the escape, but the gaoler shall not be arraigned thereupon till after the attainer of *A. de quo infra.*

If a felony be in fact committed, and the constable takes *A.* upon suspicion of felony, and after voluntarily suffers him to go at large, [592] tho *A.* be not then indicted, yet this is a felonious escape in the constable, tho 42 *Affiz.* 5. be otherwise (*a*), yet 44 *Affiz.* 12. *Dy.* 99. *a.* 43 *E.* 3. 36. *a. accord. (b)*

And altho the constable be well assured after the arrest by him made, that *A.* was not the person that did it, yet he may not by the law discharge him, but must bring him before a justice, who may upon due circumstances discharge, bail, or commit him, as he sees cause; but the constable, if he discharges him, is finable.

But if the constable after the arrest finds certainly, that there was no felony committed, it is held he may discharge him both without danger of felony, (which is true,) and without any danger of fine and imprisonment, 13 H. 7. *Kelw.* 34. *a. b.* but then it is at his peril,

(*a*) That was the case of a negligent (not voluntarily) escape, and for that reason could not be felony, tho it is there given as a reason, why it should not be adjudged an escape, because the thief was not taken with the *mainsuvre*, nor at the suit of the party, nor indicted of felony.

(*b*) This case is plainly the same with 44 *Affiz.* 12, and seems to be the case of a voluntary escape; it does not report any re-

solution of the court, but only says, that the bailiffs who let the thief go, altho he were not indicted, were charged with an escape; and a *quare* is added at the end of the case; and as to the case in *Dyer*, that was not the case of the person arresting letting the thief go, but of a third person's rescuing him, and that is said to be felony, altho he was not indicted. See 1 *E.* 3 16. *b.*

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if in truth there were a felony committed, and the party be guilty; *sed de his vide infra, Dalt. cap. 106. p. 271. accords. (c)*

If *A.* be committed for petit larciny, and so it appears by the charge of his *Mittimus*, and the gaoler lets him at large, this is a contempt, for which he shall be fined, but not felony in the gaoler; so if he were convicted of petit larciny before the escape. *Stamf. P. C. Lib. I. cap. 27. p. 33. b. 8. E. 2. Coron. 430.*

So if a man be originally committed for manslaughter *per infortunium* or *se defendendo*, or were convict only *se defendendo* or *per infortunium*, and afterwards the gaoler suffers him voluntarily to escape, it is no felony; but if the commitment or indictment were for manslaughter, tho in truth it were but *se defendendo*, yet *primâ facie* a voluntary escape is indictable as felony, tho in *eventu* it may fall out otherwise; *de quo infra.*

If *A.* be indicted of murder for the death of *B.* and pardoned or acquitted within the year, but left in gaol till the [593] year be elapsed, upon the statute of 3 H. 7. cap. 1. that the wife may bring her appeal if she pleases, and after that acquittal, and within the year, the gaoler suffers him voluntarily to escape, it is felony *primâ facie*, and the gaoler may be indicted for it as felony; but if the wife brings not her appeal within the year, or bringing her appeal *A.* is acquitted, the gaoler ought to be acquitted: *vide infra, Plowd. Com. 476. b.*

If *A.* commits felony, and being convicted prays his clergy and the court take time to advise upon it till another sessions, and in the mean time he is left in gaol. as he ought to be, and the gaoler voluntarily suffer him to make his escape, this is felony in the gaoler, for such a prisoner stands yet under a conviction of felony, and therefore is not by law bailable; but if the felon be retaken, and hath his clergy, the felony in the escape is purged, and the gaoler is not indictable after, or if indicted before the clergy allowed, he is to be acquitted.

If *A.* be indicted of felony, and hath his clergy, but is continued for six months in custody for his farther correction, according to the power given by the statute of 18 Eliz. cap. 7. and the gaoler suffers him to escape voluntarily, it is a misdemeanor punishable by fine and imprisonment, but no felony.

If a man be delivered to the ordinary as a clerk convict upon his own confession, or as a clerk attaint, in which cases he ought not to

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be admitted to purgation, and the ordinary notwithstanding admits him to his purgation, and sets him at large, this, at common law, had been a misdemeanor fineable; but it seems it had not been felony in the ordinary; for in those times there was a pretension, that a clerk was not within the temporal jurisdiction; but the law concerning purgation is altered since by the statute of 18 Eliz. cap. 7. and other statutes; *de quo infra*, 21 Affiz. 12. 9 E. 4. 28.

Thus far what shall be said a felony.

II. What shall be said to be a having in custody.

Every man is bound by law to pursue and take a felon; and if he makes not pursuit, he is fineable.

But if *A.* commits a felony in the presence of *B.* and *B.* [594] never takes him, nor attempts it, this is not felony in *B.* for *B.* had him not in his custody.

So it is if *A.* commits a felony, and *B.* receives him knowing him to be a felon, and then *B.* voluntarily suffers him to depart, tho the receipt makes him accessory after, yet it is no escape by *B.* because he never arrested him, and so had him not in custody. 9 H. 4. 1. (d)

If *A.* being acquit of felony, judgment is given, that he shall go free paying his fees, tho the gaoler lets him go before fees paid, it is not felony, for by that judgment he is no longer in custody as a felon. 21 H. 7. 17.

If the constable arrests a man for felony, and brings him to the gaol, and the gaoler refuses to receive him, yet in law he is in the custody of the constable, and if he lets him go, he is chargeable in an escape. 10 H. 4. 7. a. *Escape* 8.

If *A.* have a franchise to have the custody of felons in his gaol [for three days] (e), and then to deliver over to the sheriff or county-gaol, and after the three days he offers him to the county-gaol, and the gaoler do not receive him, he yet remains a prisoner to *A* and if he suffers a voluntary escape, it is felony. 27 Affiz. 27. yet in both these cases the gaoler is punishable for not receiving the felon by 4 E. 3. cap. 10.

If *A.* arrest *B.* of felony, and deliver him to the constable or to the vill, and they receive him, *A.* is discharged of the custody, and the escape after is chargeable upon the constable or vill, and if the

(d) 24. b.

(e) These words are not in the original argument, and are mentioned in the case here quoted by our author, *viz.* 27 MS. but yet are plainly supposed in the *Affiz.* 27.

constable or vill delivers him to the sheriff or his gaoler, and he receives him, the constable and vill are discharged of the custody, and the sheriff or gaoler is chargeable with the escape after. 3 E. 3. *Coron.* 328. 337.

As touching escapes without arrests, they belong not to this title of voluntary escapes; *sed hæc vide infra & supra.*

If *A.* the sheriff of *B.* hath a felon in gaol, and then *C.* is mad sheriff, till the prisoner be turned over by indenture to the new sheriff, the custody of him remains in *A.* and he or his gaoler is chargeable for a negligent escape, and his gaoler chargeable [595] for a voluntary escape.

If the bailiff of a franchise, that hath a gaol, hath the custody of a felon, he is chargeable for his escape, and not the sheriff or his gaoler.

III. Who shall be said a person lawfully having the custody of a felon: this hath been touched in the former section, but now shall be farther prosecuted.

If *A.* a meer private man knows *B.* to have committed a felony, he may thereupon arrest him of felony, and he is lawfully in the custody of *A.* till he be discharged of him by delivering him to the constable or common gaol; and therefor if he voluntarily suffers him to escape out of his custody, tho he were no officer, nor *B.* indicted, it is felony in *A.*

So it is, if a felony be in fact committed, and *A.* hath a probable cause to suspect *B.* and accordingly suspects and arrests him, *B.* is lawfully in the custody of *A.* for suspicion of felony; and if he voluntarily lets him escape, it is felony in *A. in eventu*, viz. if *B.* proves really guilty of the felony.

And accordingly if *A.* delivers the party so arrested to the constable's custody, he is lawfully in his custody, and if he suffers the escape voluntarily, it is felony *in eventu*. 44 *Affiz.* 12.

If a justice of peace makes a *Mittimus* to the gaoler for felony with an unapt conclusion, as till the justice give order for his delivery, whereas it should be till he be delivered by due course of law, tho this warrant be not formal, yet the felon is lawfully in his custody, and if he lets him voluntarily escape, it is felony, for he is sufficiently ascertained of the crime with which he is charged.

And it seems to me, if the *Mittimus* be general and contains no certain cause, tho the gaoler is not bound to receive him upon such a

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Mittimus, yet if he be acquainted what the crime is for which he is committed, if he suffers him voluntarily to escape, it is felony.

For if a private person or a constable arrests a man for felony, and carries him to the common gaol, (as he may do by law, 13 E. 4. 9. [596] 4 E. 3. cap. 10. if the constable or person that delivers him, acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him escape, and yet there is no *Mittimus* in that case, but a notice *ore tenus*.

The stocks is the prison of the constable, and so long as he is in the stocks he is in the constable's custody, and therefore if the constable wilfully lets a felon escape out of the stocks, and go at large, it is felony in the constable, unless it be to bring him to a justice, or to a safer or more convenient custody.

IV. What shall be said a voluntary escape of a felon in custody, for it must be a *voluntary escape* to make felony.

If the prisoner be rescued, or rescues himself against the will of him that hath him in custody, this is no voluntary escape, nor is the gaoler, &c. punishable for the same.

If the prison be fired, and the gaoler lets out the prisoners, there being no other means to save their lives, and uses the best means he can by his officers and irons to keep them safe, and this without fraud, or if enemies force him to open the prison doors; and he doth it to save his life, it excuseth from felony.

And if it be done by rebels, tho this excuse not the gaoler or sheriff in civil actions, but he is liable to an action of debt, or upon the case for the escape, because the sheriff hath his remedy over, yet it excuseth the gaoler from felony, and also from a fine, if it be *vis major, quam cui resisti potest*.

If a justice of peace bails a person not bailable by law, it excuseth the gaoler, and it is not felony in the justice, but a negligent escape, for which he is fineable at common law, 25 E. 3. 39. (g), and by the justices of gaol-delivery by the statute of 1 & 2 P. & M. cap. 13.

And the like in case of a sheriff, under-sheriff, constable, bailiff of a liberty bailing one that is not by law bailable, it is not a voluntary

(f) This statute obliges the gaoler to receive felons by the delivery of the constables or townships, but says nothing as to the delivery by private persons.

(g) In the last edition of the year-books, which is in this place mispaged, it is 25 E. 3. 82. s.

escape,

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escape, at least unless done by design to deliver the prisoner for ever, but it is a negligent escape punishable at common law, or according to the statute of 3 E. 1. cap. 15. by loss of office, [597] fine, and three years imprisonment.

And therefore I think, that if a justice of peace bails a person, that confesseth a felony before him, it is no voluntary escape, but fineable as above, for it is *error scientiæ*, 2 R. 3. 10. contrary to the opinion of *Crompt. 39. a Dalt. p. 276. (h)*

If a gaoler voluntarily licence a felon to wander out of the bounds of the prison and to return again, if the prisoner returns again to the gaol before the gaoler be indicted, so as he be in custody, it is held by some this will not excuse a voluntary escape as to the point of felony, but certain it is that it is punishable as a misdemeanor, and if he had never returned, it had been such an escape, as would have been felony, tho perchance the licence were special to go out and come in at night. 22 E. 3. *Coron.* 242. 8 E. 2. *Coron.* 431. because he cannot apportion his own wrong and breach of duty.

V. In whom the voluntary escape shall be.

In all civil causes the sheriff is to be responsible, or the gaoler at election, as if the gaoler, or bailiff of a sheriff suffer either voluntarily or negligently an escape of a person imprisoned for debt, the sheriff is chargeable with an action upon the escape, for the gaoler or bailiff is the sheriff's officer or minister, and gives him security. 14 E. 3. cap. 10. 19 H. 7. cap. 10.

But if the gaoler being placed there by the sheriff voluntarily suffers a felon in his custody to escape, this, in as much as it reacheth to life, is felony only in the gaoler that was immediately trusted with the custody, not in the sheriff.

But whether the escape was voluntary or negligent, yet the sheriff may be indicted for it so as to subject him to a great fine and imprisonment for the offense of his gaoler, tho not to make him guilty of felony. *Dalt. cap. 106. p. 273. (i), Doctor and Student 42. (k)*

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho it were such in the gaoler, for he was not privy to it, and therefore could not do it *felonice*, but it was a negligent escape in him in trusting [598]

(b) *New Edit. p. 513.*

(i) *New Edit. p. 509.*

(k) *Dialog. 2. cap. 42.*

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such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer, for the miscarriage of his gaoler.

But if the gaoler were a gaoler in fee, as antiently constables of castles were, the sheriff should not answer in any kind for the default of such gaoler or constable: but now by the statutes of 14 E. 3. cap. 10 and 19 H. 7. cap. 10. gaols of counties are rejoined to the counties.

But for escapes committed by gaolers of gaols in particular franchises, as the *Gate-house at Westminster* belonging to the dean and chapter of *Westminster*, escapes there permitted concern not the sheriff, but the particular gaoler and lord of the franchise.

VI. How and in what manner, and before whom felonious escapes shall be determined, tried and adjudged.

It is to be known, that I may say it once for all, altho the felony for breaking of prison may be heard, tried and determined before the felony, for which he was committed, as shall be said; yet in case of a felony for the wilful escape or rescue of a person committed to prison for felony, tho the party that voluntarily permits such escape, or rescues the prisoner, may be indicted for these offenses as felonies before the principal felony in him that escapes or is rescued be tried, yet he shall not be arraigned or put upon his trial, till the principal be convicted or attainted; and the reason is, because possibly the person escaping may be found not guilty, or if guilty, yet of such a fact as is not capital; as of petit larceny, *se defendendo, per infortunium*, in which case the rescuer or officer ought to be discharged: nay, if the principal person be only convict and not attaint, but hath his clergy, I think the gaoler or rescuer shall never be put to answer to the escape or rescue, but be discharged, as the accessory, where the principal hath his clergy, shall be discharged thereby; for the rescuer and officer, that permits the escape, are a kind of accessories.

But in these cases the gaoler or rescuer may be fined and [599] imprisoned for their misdemeanor, but shall not be charged with felony, where the principal is discharged. 2 Co. Instit. p. 592.

Again, it is to be remembered, that there is a voluntary escape before indictment, and a voluntary escape of a party indicted of felony.

1. If the party that escapes were not indicted at the time of the escape voluntarily permitted, the indictment of the gaoler (and so in case

case of a rescue) ought to surmise, that *de facto* a felony was committed, and that the person escaping was imprisoned for that felony or suspicion of it.

And I need not say this must be proved upon evidence against the gaoler, for, as I said before, the gaoler cannot be arraigned till the principal be attainted by verdict, confession, or outlawry, and the record of such attainder must be shewed or proved.

2. But if the party that escaped were indicted, and so taken by *Copias*, and then escape, tho, as I said before, the gaoler or rescuer cannot be arraigned and tried till the principal be attainted, yet the indictment for the escape or rescue need not surmise a felony done, but only recite the substance of the indictment against him that escapes. 1 E. 3. 16. b. 2 E. 3. *Coron.* 158.

And the like law is in case of felony for breach of prison. 2 Co. *Instit.* p. 590.

Again it is to be known, that as to the voluntary suffering of an escape or rescuing a felon, tho the felony be not within clergy, yet the escape or rescue are within clergy, and tho the prisoner were indicted or attainted of several felonies, yet the escape or rescue of such a prisoner makes but one felony, and he shall be indicted but of one escape; but if A. and B. be indicted of one felony, and the gaoler voluntarily suffer both to escape, the gaoler may be indicted severally for both.

The means of bringing an officer to judgment cannot be barely by the calling of the record of the prisoners over, as is usually done in the king's bench, because tho this may be a sufficient cause to convict of a negligent escape, yet it cannot appear thereby that it is voluntary; the marshal or gaoler may be fined upon a record thereof made, but he cannot be convict of a felony, 39 H. 6. [600] 33. but there must be an indictment or presentment of the felonious and voluntary escape.

And tho by the statute of *Westm.* 1. cap. 3. (1) amercements upon the country for the escapes of felons cannot be set but by the justices in *Eyre*, or by the king's bench, 21 *Affiz.* 12. 21 *Affiz.* 27. or, as it seems, by justices of general *ayer* and *terminer*; yet the hearing and determining of escapes is at this day within the jurisdiction of justices of peace, or any other justices, by the statutes of 1 R. 3. cap. 3. 31 E. 3. cap. 14.

(1) 2 Co. *Instit.* 165.

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And thus far concerning voluntary escapes of felons, where it is felony and where not.

In the next chapter I shall say something concerning negligent escapes, tho this hath been before, cap. 50. in part handled.

4 Blackf. Com. ch. 10. p. 129, 130. and 2 Hawk. P. C. ch. 18, 19. and Burn. tit. Escape.

C H A P. LII.

Touching negligent escapes.

NEGLIGENT escapes of felons are not felony, but punishable by fine upon the parties that suffer them.

These negligent escapes are of two kinds, 1. By an officer or some particular person or persons, that hath a felon in custody, 2. Or by vills or townships, whether the felon be taken and in custody, or not taken.

I. First as to negligent escapes by officers or particular persons these things are considerable.

1. What shall be said a negligent escape. 2. What the conviction of such negligent escape. 3. What the punishment of it, and by whom.

[601] As to the first of these, what shall be said a negligent escape hath been partly before described, only some things I shall add.

If a prisoner for felony break the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it, and therefore it is by law lawful for the gaoler to hamper them with irons to prevent their escape (*a*), and if

(*a*) And therefore this liberty can only be intended, where the officer has just reason to fear an escape, as where the prisoner is unruly or makes any attempt to that purpose; but otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbid to put their prisoners to any pain or torment; see Co. P. C. p. 34 & 35. *Guledes*

gaolorum personam fibi commissis non angrest, nec eos torqueant vel redimant, sed mani servitudo remota pietateque adibilitate judicia debite exequuntur, Flet. Lib. I. cap. 26. and the Mirror of Justices, cap. 5. l. 1. n. 54. says, It is an abuse that prisoners should be charged with irons, or put to any pain before they be accused of felony; and lord Coke in his comment on the statute of Westm. 2. cap. II. is express, that by the common law it might not be done. 2 Inst. 381.

this

this should not be construed a negligent escape, gaolers would be careless either to secure their prisoners, or to retake them that escape, if he should in such a case be exempt from pecuniary punishment; and we see by daily experience in civil cases of men in execution or arrested for debt, if they break prison the sheriff is chargeable.

But if a private person arrests a felon, and he escapes by force from him without any default in him, tho the township shall be amerced, as shall be said, yet it seems it excuseth the party, for he being a private person cannot raise power to take or detain a felon.

But if a sheriff, bailiff, constable, or other officer hath the custody of a prisoner bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself doth not excuse him *a toto*, though it may *a tanto*, because he may take sufficient strength to his assistance; but if he be rescued before he be brought to gaol, *quare*, whether it be not an excuse of an escape, as in case where a man is arrested upon a mesne process, and in carrying to gaol be rescued, the return of the rescue excuseth the sheriff, 39 Eliz. C. B. *Croke*, n. 22. *Conyer's case*; but it is no excuse if he be taken in execution [602] and rescued, for there the sheriff shall be answerable notwithstanding the rescue, but it seems the rescue is no excuse in case of felony. 3 E. 3. *Coron.* 328. 337. (b)

And upon the same reason it is, that if a felon be attaint and be carried to execution, and be rescued from the sheriff, the sheriff is punishable notwithstanding the rescue, for there is judgment given, and the sheriff should have taken sufficient power with him, and therefore in that case the township is not fineable: *vide 27 Affiz.* 54.

If a prisoner for felony be in gaol and escape, and the gaoler pursue after him, he may take him seven years after, tho he were out of his view, 13 E. 4. 9. a. 14 H. 7. 1. a. but that will not excuse the gaoler from a negligent escape, tho it may excuse *a tanto*; for if the gaoler hath once lost the view of his prisoner, tho he take him after, it is an escape, but if he retake him upon a fresh pursuit, and hath still the view of him, it is no escape, nor punishable. 8 E. 2. *Coron.* 400. 22 E. 3. *Coron.* 236. M. 28 E. 3. Rot. 32. *Rex. Herif. Casus Abbatis Sancti Albani.* M. 45 E. 3. Rot. 17. in dorf. *Rex. Effex.*

But if a man be arrested for felony, and in bringing to gaol by the sheriff's bailiff or constable he makes his escape, and they follow him

(b) These cases, as also *Conyer's case* here mentioned, prove nothing particularly as to a rescue, but only in general, that a sheriff shall be liable in case of an escape.

and

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and keep the view of him, but cannot take him without killing him, whereby he is kild in the pursuit, yet the sheriff or constable, or township, that let him escape, shall be fined for the escape, because tho the party be kild in the fresh pursuit, he cannot now be brought to judgment, and yet by his flight, if presented by the coroner, he forfeits his goods. *3 E. 3. Coron. 328 and 346.*

If a felon escape out of the gaol by negligence, tho the gaoler be fined for it, he may retake the felon at any time after, for the felon shall not take the advantage of his own wrong, or the gaoler's punishment, but his retaking shall not discharge the gaoler's fine, and so is the book to be intended. *13 E. 4. 9. a.*

[603] 2. Touching the conviction of a negligent escape.
The proper way of conviction is by presentment and trial thereupon.

Yet where the prisoners be of record in a court, if the gaoler being called cannot give an account where a prisoner is, this is a conviction of an escape, but seems not to be presently a conviction of a voluntary escape, unless the gaoler confess it: *vide 27 H. 6. 7. 39 H. 6. 33.* so in some cases the coroner's roll is a conviction of an escape, *vide 3 E. 3. Coron. 352.* so if the dozeners present a felon taken and delivered to the sheriff by the vill, but shew not what sheriff. *3 E. 3. Coron. 345. (c)*

Where an officer is to be charged either with a voluntary or negligent escape, the bare presentment of the escape by the grand inquest or the dozeners in *Eyre*, or upon commission of *Oyer and Terminer*, or in the king's bench, is not alone sufficient to convict the officer, because upon his conviction, tho but of a negligent escape, he is to be fined.

But if the dozeners in *Eyre* or in the king's bench present the escape of a felon, whereby the vill is to be amerced, because this is but an amercement, and the justices may [not in this case (*d*)] set a fine but an amercement, *de minimis non curat lex*, and therefore the presentment is not traversable: *vide 3 E. 3. Coron. 291. & ibidem 3 E. 3. Coron. 328. 346.. Stamf. P. C. Lib. I. cap. 33. fol. 35. b.*

(c) The words of the book are, "When
" the dozen present, that a felon is taken
" for felony and delivered to the sheriff,
" they adjudge it for an escape in *Eyre*,
" if they do not say to what sheriff by
" name, for a man may inquire his rolls
" to see whence the prisoner comes, &c.
" and if they do not find in the sheriff's

" roll, that he was charged with him, or
" if they do not find how he got out of
" his custody according to the law of the
" land, it shall be adjudged an escape in
" the sheriff.

(d) These words are wanting in the
MS. but the sense of the place seems plainly to require them.

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An escape is presentable in a leet, but they cannot set a common fine or amercements there, but it ought to be sent to the next *Eyre*, &c. or may be removed into the king's bench by *Certiorari*, and there the common fine or amercement set; and this by the Statute of *Westm.* 1. cap. 3.

3. As to the punishment of a negligent escape by an officer or other that hath the felon in custody, it is by fine and imprisonment.

If the felon be attainted, it is said that the fine is to be an [604] hundred pounds, and if he be only indicted, then an hundred shillings, *Stamf. P. C.* p. 35. but the fine in truth is more or less according to the quality of the offense, and sometimes of the offender: *vide 3 E. 3. Coron. 370.* a bishop fined one hundred pounds for an escape.

Communia Scaccario, M. 36 E. 3. n. 5. The constable of a castle under the duke of *Lancaster* permitted a negligent escape: It was ruled, 1. That in default of the constable of the duke of *Lancaster*, that put him in, should be fined. 2. That tho the duke were dead, yet his executors should be fined (e), and they were fined five pounds for negligent escape.

II. I come to those fines, that are for escapes of felons either before or sometimes after arrest.

And this is that which is set upon vills, towns, cities, and sometimes upon hundreds and counties, and is usually called *escapium*, and those that have franchises to be quit *de murdro*, *latrocinio*, *escapiis*, are intended of those common fines set upon vills or hundreds for those offenses, and then he that hath such a liberty granted by the king to be quit *de escapiis*, hath a discharge for the rate or portion of such a common fine or amercement that comes to his share; and this franchise or liberty generally granted to be quit *de escapiis* extends not to voluntary escapes by officers or others, but as I said to the rate or portion chargeable upon them by such common fine or amercement for negligent escapes.

If a murder, manslaughter, or killing of a man *se defendenda* be committed in a vill not inclosed in the day-time, and the murderer, &c. be not taken, the vill shall be amerced, altho it be done after sunset, before day-light be gone. *22 E. 3. Coron. 238. 3 E. 3. Coron. 293. 302. 3 H. 7. cap. 1.*

(e) See *a Co. Infus. 382.*

And

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And if the murder be committed in a town inclosed in the day or night, and the murderer or manslayer escapes, the town shall be amerced, because by the statute of *Winchester*, they ought to keep their gates shut from sun-set to sun-rising. 3 E. 3. *Coron.* 299. 3 *H. 7. cap. 1.*

[605] If a felony be committed in a vill, and they take the felon, and commit him to four men to carry him to gaol, and they suffer him to escape, the vill shall be amerced. 3 E. 3. *Coron.* 346.

If a felony be committed in a vill, and the felon taken by them of the vill, and he escapes from them to the church of the same vill, and from thence before abjuration he escapes again, the vill shall be amerced for two escapes at common law, for they should have kept him in the church till abjuration, &c. 8 E. 2. *Coron.* 422.

But if a person attaint, as they are carrying him to execution, escapes to a church, and from thence makes an escape, the vill were not amerceable, because he could not abjure being attaint, and therefore the vill were not bound to watch him, 27 *Affiz.* 54. *vide Rot. Parl.* 45 E. 3. n. 25. 50 E. 3. n. 183. But now abjuration and sanctuary are ousted (*f.*), and with it much of this old learning of escapes is antiquated.

If a prisoner for suspicion of felony be brought to the hundred court, and the court grant him liberty to seek his voucher or warrant, and he escapes, the hundred shall be amerced. 3 E. 3. *Coron.* 316. and so it is if a manslaughter be committed out of any vill. *Stamf. P. C.* 34. a.

If the vill answers not the amercement for an escape, the hundred shall be distrained, and if the hundred answers not, the county shall be charged therewith and distrained. *Stamf. P. C.* p. 34. b.

And thus far touching escapes both voluntary and negligent.

⁴ Blackf. Com. ch. 10. p. 129, 130. and a Hawk. P. C. ch. 19. and Burnet. tit. Escape.

(*f.*) By 21 *Jac.* cap. 22. §. 7.

C H A P. LIII.

Concerning rescues of prisoners in custody for felony.

RESCUE of a person imprisoned for felony is also felony by the common law.

To make a rescue a felony, 1. It is necessary that the felon be *in custody, or under arrest* for felony, and therefore if *A.* hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and *A.* shall be fined for the hindrance of his taking; but it is not felony in *A.* because the felon was not taken. 3 E. 3. *Coron.* 333. *Stamf. P. C.* p. 31. a.

2. Again, to make a rescue felony, the party rescued must be *under custody for felony or suspicion of felony*, and it is all one, whether he be in custody for that account by a private person, or by an officer or warrant of a justice, for where the arrest of a felon is lawful, the rescue of him is a felony.

It seems that it is necessary that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person.

But if he be in the custody of an officer, as constable or sheriff, there at his peril he is to take notice of it; and so it is if there be felons in a prison, and *A.* not knowing of it, breaks the prison, and lets out the prisoners, tho he knew not that there were felons there, it is felony, and if traitors were there, it is treason. *P. 16 Car. 1. Croke p. 583. Benstead's case per omnes justiciarios.*

A return of a rescue of a felon by the sheriff against *A.* is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute of 25 E. 3. cap. 4. 1 H. 7. 6. a. *per curiam, 2 E. 3. 1 Coron. 149.*

As in case of an escape, so in case of a rescue, if the party rescued be imprisoned for felony, and be rescued before indictment, the indictment must surmise a felony done as well as an imprisonment for felony or suspicion thereof; but if the party be indicted and taken by a *Capias* and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued.

The

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But tho the rescuer may be indicted before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attaint for the reason given, cap. 51.

The rescuer of a prisoner for felony, tho not within clergy, yet shall have his clergy.

Vide plus capite proximo, for many things there said are applicable to the case of a rescue.

⁴ Blackf. Com. ch. 10. p. 131. Foster. 344. Burn. tit. Rescue. 2 Hawk. P. C. ch. 21.

C H A P. LIV.

Concerning escapes and breach of prison, by the party himself that is imprisoned for felony.

AT common law it was held, that if any imprisoned for a misdemeanor, tho not felony, had broke the prison and escaped, it had been felony. Bratt. Lib. II. (a). Stamf. P. C. p. 30. b. 2 Co. Inflit. p. 589. (b)

But by the statute of 1 E. 2. de frangentibus prisonam the [608] severity of the common law is moderated, viz. Nullus de cætero, qui prisonam fregerit, subeat judicium vitæ vel membrorum pro fractione prisonæ tantum, nisi causa, pro quâ captus & imprisonatus fuerit, tale judicium requirit, si de illa secundum legem & consuetudinem terre fuerit convictus, licet temporibus præteritis aliter fieri consuevit.

Upon this statute, therefore, to make a felony by breach of prison these things must concur: 1. The party must be in prison. 2. He must be in prison for felony. 3. He must break that prison. Many of these things have been discussed before. I shall resume and add what shall be necessary for the explication of this felony.

I. What is a prison, and who shall be said a person in prison.

If a man be imprisoned for felony in the prison of a franchise, and breaks and escapes, this is a breaker of prison, and it is as to

(a) This should be Lib. III. tratt. 2. de Corona, cap. 9. f. 124. a. In this place Bratt. carries the matter very far; for he says, tho the party were innocent, and had only *conspired* to escape, he was *ultime supplex perirendus*.

(b) But this severity is complained of as an abuse, Mirror, cap. 5. §. 1, and it was

the opinion of Billing, chief justice, and the rest of the judges, 1 H. 7. 6. a. that a rescue of a felon was felony at common law, but not in the person himself, till the Statute of 1 E. 2. This lord Coke says must be intended, where others break the prison without his privity. 2 Inst. 589.

this

this purpose the king's prison (*c.*), tho' the franchise or profit be the lord's. 2 E. 3. 1 Coron. 149. Stamf. P. C. 31. a. 2 Co. Inst. 589.

So at common law when sanctuary was in use, if a felon had escaped to a church, and there had been watched by the vill where the church is, and he had broken the church and escaped, this had been a felony within this statute. Stamf. P. C. p. 30. b. 3 E. 3. Coron. 290.

Whether the breach of the prison of the ordinary by a clerk convict or attaint before purgation had been felony, *vide* Stamf. P. C. p. 31, 32. but that learning is now antiquated, because by the statute of 18 Eliz. cap. 7. the prisoner is not now delivered to the ordinary; and therefore I shall not farther examine it.

If a person be taken for felony, and put in the stocks and breaks it, this is a breaking of prison, and felony within the [609] law. Dy. 99. a. 2 Co. Inst. 589. Stamf. P. C. p. 30. b.

So it is if the constable or any other secures a felon in the house of him that makes the arrest, or in the house of any other, and he breaks it and escapes, it is felony.

Yet farther, if *A.* arrests *B.* for felony or suspicion of felony, there being *de facto* a felony committed, and being in the hands of *A.* he violently rescueth himself and escapeth, this is a breach of prison and a felony, for so are the words of my lord Coke, 2 Inst. 589. "Nota, He that is in the stocks, or under lawful arrest, is said to be in prison, tho' he be not *infra carceris parietes*." And Stamford *ubi supra* p. 30. b. *Et nota quant a ceo que chescun que est soubs arrest pour felony est prisoner auxy bien hors de gaol come deins, issint que fil soit lorsque in cippes in le haut street ou hors de cippes in le poſſeſſion d' ascun, que lui aver arrest, & faite escape ceo est debruslement de prison in le prisoner,* which must be intended, as it seems, of a violent escape, *viz.* rescuing himself out of custody.

II. What shall be said a being in prison for such a cause, as requires *judicium vita vel membrorum.*

(c) Stamford in the place here mentioned thinks it is not the king's prison, and therefore at common law the breaking of it would not be felony; but by the statute of 1 E. 2. it matters not whether it be the king's prison or no, for it speaks *de prisione* generally, and not *de prisione nostra*; how-

ever, as it must be intended a legal prison, which cannot be without a grant from the crown, our author's construction is very reasonable, that all such prisons should be taken as to this purpose to be the king's prisons.

It seems it is intended only of capital offenses, as felony, and therefore if a man be committed for petit larciny, or homicide *se defendendo*, or *per infortunium*, and breaks prison, this is not felony, for the principal offense *non requirit tale judicium*. 2. Co. Inst. 590.

But if the commitment expresses larciny above value or manslaughter, tho' *de facto* it were but petit larciny, or *per infortunium* or *se defendendo*, and possibly would appear so upon the evidence, yet this escape will be felony.

Touching my lord Coke's opinion of the form of the *Mittimus*, that it must particularly express the nature of the felony, and must have an apt conclusion, I have said enough before; I think it is sufficient if it be generally for felony, altho' it wants that regular conclusion (*till he be delivered by due course of common law*); yet these defaults will not excuse the breach of prison from felony: but possibly if [610] it express no cause, the case may be otherwise, because the substance of the *Mittimus* must be recited in the indictment.

For it is very plain, that antiently there were more felons committed to the common gaol without *Mittimus* in writing than were with it; such were all the commitments by constable, watchmen, and private persons arresting for felony and bringing to the common gaol; and *Mittimus*'s were not of so antient a date as justices of peace, and they were not before 1 E. 3. (d), and yet breach of prison by felons was felony even from 2 E. 1. and not only from 1 E. 2.

It is therefore enough if the gaoler have a sufficient notification of the nature of the offense, for which he was committed, and the prisoner of the offense whereof he was arrested, and commonly they know their own guilt, if they are guilty, without much notification.

And again, by what hath been said, breach of prison is not only where the felon is formally committed to gaol by a *Mittimus*, but if he be put in the stocks, kept in the constable's house, nay, under the custody of him that makes the arrest, and he breaks prison, it is a felony, tho' in these cases there neither are nor can be *Mittimus*'s.

If A. arrests B. for suspicion of felony, and carries him to the common gaol, and there delivers him, as he may do, 13 E. 4. 9. a. 4 E. 3. cap. 10. and he breaks prison, if he be indicted upon it there must be an averment in the indictment, that there was a felony

(d) See 1 E. 3. cap. 16.

committed,

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committed, and *A.* having probable cause did suspect *B.* and arrested him and committed him, and that he broke the prison, and this must be all proved upon the evidence.

But if *B.* be indicted or appealed and taken by *Capias*, and committed, and breaks prison, there needs no averment or proof that a felony was done, but only that there was an indictment or appeal, and a *Capias* thereupon, because all appears by matter of record. 2 *Co. Instit.* 590.

But a lawful commitment may be for suspicion of felony, and this is within this statute; yet no person can be indicted barely [611] of suspicion of felony, but of the felony itself. 43 *E. 3.* *Coron* 454. 44 *Affiz.* 12. 2. *Co. Instit.* 592.

If a felony be made by act of parliament subsequent to 1 *E. 2.* and a person be committed for such a felony and breaks prison, yet this is felony. 2 *Co. Instit.* 592.

III. What shall be said a breaking of prison by a person committed for felony to make a felony.

If the prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony; but if the prison were fired by the prisoner himself, or by his procurement, the breaking to save his life is nevertheless felony, for it was a necessity of his own creating. 2 *Co. Instit.* 590.

If the gaoler sets open the prison doors, and the felon escapes, this may be a felony in the gaoler, but is no breach of prison to make felony in the prisoner.

If *A.* be arrested or imprisoned for felony, and *B.* and others without the consent of *A.* rescues *A.* this is felony in the rescuers, but not felony in *A.* But if *A.* were of confederacy with *B.* to do it, then it is felony in *B.* as a rescue, and in *A.* as a breach of prison.

And so it is if *B.* had broken the prison doors, and they being open, *A.* had gone away, this had been felony in *B.* but not felony in *A.* unless it were done by his confederacy, or procurement, for *A.* did not actually break prison 2 *Co. Instit.* 589. 1 *H. 7. 6. a.*

IV. Touching the proceeding for felony by breach of prison.

A. is committed for felony, or suspicion thereof, and breaks prison, he may be indicted, arraigned, convicted, and have judgment for the escape, altho the principal felony be not tried, and he may be not guilty of the felony; and so it differs from the case of a rescue or escape before, and the reason is, because here it is the same person,

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Son, there they are divers, and therefore in the latter case the principal felony shall be first tried. 2 Co. Inst. 592.

And yet I hold, that if *A.* be indicted of felony and committed, and [612] then breaks prison, and then be arraigned of the principal felony and found not guilty, now *A.* shall never be indicted for the breach of prison; or if indicted for it before the acquittal, and then he is acquitted of the principal felony, he may plead *that* acquittal of the principal felony in bar to the indictment for the felony for breach of prison.

And so it was pleaded by myself in the case of one Mrs. Samford, who was severely prosecuted by the earl of Leicster, upon a suspicion that she had stolen his jewels; for tho' while the principal felony stood untried, it stood indifferent whether she were guilty of the principal felony, or rather the breach of prison was a presumption of the guilt of the principal offense, yet now it be cleared, that she was not guilty of the felony, she is now in law as a person never committed for felony, and so her breach of prison is no felony.

The felony of breach of prison is a felony within clergy, tho' the principal felony for which the party was convicted were out of clergy, as robbery or murder.

4 Blackf. Com. ch. 10. p. 130. 2 Hawk. P.C. ch. 18. Burn. tit. Prison Breaking.

C H A P. LV.

Of principals and accessories in felony, and first of accessories before the fact.

HAVING gone through the considerations of the offenses of treasons, and also of felonies at the common law, it will be seasonable in this place to consider of those different relations of principals and accessories, whereof tho' much hath occasionally been mentioned, yet I shall now proceed to the discussion of this matter distinctly and apart, and shall put together all the learning that occurs to me concerning this master.

[613] In the highest capital offense, namely, high treason, there are no accessories neither before nor after, for all consenters aiders

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aiders, abettors, and knowing receivers and comforters of traitors, are all principals, as hath been said, 3 H. 7. 10. *a. Stamf. P. C. p. 40. a. Co. P. C. p. 20.*

But yet as to the course of proceeding, it hath been and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried before those that are principals in the second degree, because otherwise this inconvenience might follow, *viz.* that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd: *vide Somervill's case (a)* before, *cap. 22. p. 238.*

In cases that are criminal, but not capital, as in trespass, mayhem, or *præmunire*, there are no accessaries, for all the accessaries *before*, are in the same degree as principals, *Stamf. Lib. I. cap. 48. & libres ibi;* and accessaries *after*, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties, do expressly extend to receivers or comforters, as some do.

Note the word *maintainers* in the statute of 27 E. 3. *cap. 1.* and 16 R. 2. *cap. 5.* denotes the maintainers of the offense, and not (as it seems) of the parties.

It remains, therefore, that the busines of this title of principal and accessory refers only to felonies, whether by the common law, or by act of parliament.

As to felonies by act of parliament, regularly if an act of parliament enacts an offense to be felony, tho it mentions nothing of accessaries *before* or *after*, yet virtually, and consequently those that counsel or command the offense are accessaries *before*, and those that knowingly receive the offender are accessaries *after*, as in the case of rape made felony by the statute of Westmst. 2. *cap. 34. (b), Stamf. P. C. Lib. I. cap. 47, 11 H. 4. 14.* in case of multiplication, [614] *Co. P. C. cap. 20.* tho *Dy. 88.* makes it a *quare.*

But if the act of parliament that makes the felony, in express terms comprehend accessaries *before*, and makes no mention of accessaries *after*, namely, receivers or comforters, there it seems there can be no

(a) *1 And. 109.* But it was ruled in that case, that upon that branch of treason, which relates to the compassing the death of the king, there is no need that the principal in the first degree, (*viz.* he who undertook to do the act) should be first tried,

for the movers or procurers are guilty of compassing the death of the king, altho he that was procured should never assent thereto.

(b) *2 Co. Instit. 434.*

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accessaries *after*, for the expression of procurers, counsellers, abettors, all which import accessaries *before*, make it evident, that the law-makers did not intend to include accessaries *after*, which is an offence of a lower degree than accessaries *before*, as the statute of 8 H. 6. cap. 12. for stealing of records, the statute of 33 H. 8. cap. 8. for witchcraft, &c. *Stamford's P. C. ubi supra.*

It is true my lord Coke, *P. C. cap. 19. p. 72, 73.* denies the opinion of *Stamford*, and affirms, that tho the statute of 8 H. 6. cap. 12. mentions only accessaries *before*, yet virtually and consequentially accessaries *after* are included, as well as in felonies at common law; but he neither allegeth any reason or authority for that opinion, and therefore the authorities being equal, the greater reason seems to be with *Stamford's* opinion, *Expressum facit cessare tacitum*, and no weight can be laid upon the statute of 3 H. 7. cap. 2. for that in express terms makes accessaries *before* and *after* to stand as principals.

And upon the same reason it is, that many of these acts of parliament mentioned before, *cap. 22. p. 236.* that make certain offences, their counsellers, abettors, and procurers, to be treason, do not extend to make receivers guilty of treason, tho if the act had been general that such an offence shall be treason, it had consequentially made knowing receivers as well as abettors guilty of treason: *vide Co. P. C. cap. 64. p. 138.*

The generally an act of parliament creating a felony renders consequentially accessaries *before* and *after* within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case.

The statute of 3 H. 7. cap. 2. for taking away maidens, &c. makes the offender, and the procuring and abetting, yea, and wittingly receiving also, to be all equally principal felonies, and excluded of clergy.

[615] Again, the statute of 27 Eliz. cap. 2. makes the coming in of a jesuit treason, the receiving or relieving of him felony, the contributing of money to his relief a *præmunire*, so that acts of parliament may diversify the offences of accessory or principal according to the various penning thereof, and so have done in many cases.

And thus much as to accessaries to felonies made by act of parliament, which being general directions may be applicable almost to all cases.

I come

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I come to consider of principals and accessaries in felony, and their differences among themselves, and with relation to felonies at common law.

By what hath been formerly delivered, principals are in two kinds, principals in the first degree, which actually commit the offense, principals in the second degree, which are present, aiding, and abetting of the fact to be done.

So that regularly no man can be a principal in felony, unless he be present, unless it can be in case of wilful poisoning, wherein he that layeth or infuseth poison with intent to poison any person, and the person intended, or any other takes it in the absence of him that so layeth it, yet he is a principal, and he that counselleth or abbetteth him so to do, is accessary before. *Co. P. C. cap. 64. p. 138.*

Who shall be said present, aiding, and abetting in case of felony, hath been sufficiently declared in *cap. 34.* in case of murder, in *cap. 48.* in case of burglary, in *cap. 46.* in case of robbery, and need not again be repeated.

Accessaries again are of two kinds, accessaries before the fact committed, and accessaries after.

An accessary before, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony, and it is an offense greater than the accessary after; and therefore in many cases clergy is taken away from accessaries before, which yet is not taken away from accessaries after, as in petit treason, murder, robbery, and wilful burning, by *4 & 5 P. & M. cap. 4.*

Those offenses, which in the construction of law are sudden and unpremeditated, cannot have any accessaries before, as killing a man *per infortunium, se defendendo,* or manslaughter. [616]

And therefore if *A.* be indicted of murder, and *B.* as accessary before, if the jury find *A.* guilty only of manslaughter, there shall be no inquiry of *B.* but he shall be forthwith discharged, because bare homicide is always sudden: for if it were premeditated, it had been murder, and not barely homicide, *Bibith's case (c),* but there may be an accessary after.

Again, the exility of the offense, tho it be felony, yet because it is not capital, excludeth accessaries before or after, and therefore in petit larceny there can be no accessary, *Anne Laffington's case, P. 42 Eliz.*

(c) *4 C. Rep. 43. b.*

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B. R. (d); and this is, also the reason why there can be no accessory neither before nor after in manslaughter *per infortunium* or *se defendendo*, because there is no judgment of death in that case.

That which makes an accessory before is *command*, *counsel*, *abettment*, or *procurement* by one to another to commit a felony, when the commander or counsellor is absent at the time of the felony committed, for if he be present he is principal.

And therefore words that sound in bare permission, make not an accessory, as if *A.* says he will kill *J. S.* and *B.* says you may do your pleasure for me, this makes not *B.* accessory. 21 *H.* 7. 36, 37. *Crompt.* 41. *b.*

If *A.* hires *B.* to mingle or lay poison for *C.* *B.* doth it accordingly, and *C.* is poisoned, *B.* the absent, is principal, *A.* is accessory; but if *A.* were present at the mingling or laying of the poison, tho both were absent at the taking of it, yet both are principals, for they are both equally acting in the poisoning.

But if *A.* buys the materials of the poison, knowing and consenting to the design, and delivers them to *B.* to mingle and apply it, or lay it in the absence of *A.* here it seems *A.* is only accessory before: *quod vide Co. P. C. cap. 7. p. 50. Franklin's case. (e)*

If *A.* commands or counsels *B.* to commit felony of one kind, and [617] *B.* commits a felony of another kind, *A.* is not accessory, as if *A.* commands *B.* to steal a plate, and *B.* commits burglary to steal the plate, *A.* is accessory to the theft, but not to the burglary. *Co. P. C. cap. 7. p. 51.*

If *A.* commands *B.* to take *C.* and *B.* takes *C.* and robs him, *A.* is not accessory to the robbery.

But if *A.* commands *B.* to beat *C.* and *B.* beats *C.* so that he dies, *A.* is accessory, because it may be a probable consequence of his beating, 3 *E. 8. Coran.* 314. *Stansf. P. C. Lib. I. cap. 45. fol. 41. a.* the like it is if he commands *B.* to rob him, and in robbing him *B.* kills him, *A.* is accessory to the murder. *Plowd. Com.* 475. *Crompt.* 43. *b.*

A. commands *B.* to burn the house of *C.* *B.* kills, robs, or steals from *C.* *A.* is not accessory, for it is an offense of another kind; so if *A.* commands *B.* to steal the horse of *C.* and he steals his cow, *A.* is not accessory. *Plowd. Com.* 475. *Sawyer's case.*

(d) *Cro. Elii* 750.

(e) *State Tr. Vol. I. p. 319*

But

But if *A.* command *B.* to steal generally from *C.* then he is accessory to any kind of theft from *C.* tho it were done by robbery, for that varies the offence only in degree.

A. commands *B.* to poison *C.* *B.* kills him with a sword, yet *A.* is accessory, for the substance of the thing commanded was the death of *C.* and the differing in the manner of its execution from the command doth not excuse *A.* from being accessory.

But if *A.* command *B.* to kill *C.* and *B* by mistake kills *D.* or else in striking at *C.* kills *D.* but misseth *C.* *A.* is not accessory to the murder of *D.* because it differs in the person. *Co. P. C. cap. 7. p. 51.* *Plowd. Com. 475.* *Saunders case.*

A. gets *B.* with child, and before the birth counsels *B.* to kill it, the child is born, *B.* murders it, *A.* is accessory to the murder, yet at the time of the counsel given the child was not *in serum natura.* *2 Eliz. Dy. 186. a.*

A. lets out a wild beast, or employs a madman to kill others, whereby any is killed, *A.* is principal in this case, tho absent, because the instrument cannot be a principal. *Dalt. cap. 108. (f)*

A. commands *B.* to kill *C.* but before the execution thereof *A.* repents, and countermands *B.* and yet *B.* proceeds in [618] the execution thereof, *A.* is not accessory, for his consent continues not, and he gave timely countermand to *B.* *Co. P. C. cap. 7. p. 51.* *Plowd. Com. 474.* *Saunders case;* but if *A.* had repented, yet if *B.* had not been actually countermanded before the fact committed, *A.* had been accessory.

(f) *New Edit. p. 589.*

4 Blackf. Com. ch. 5 of Principals and Accessories, *per se,* *solus,* and *Foster* in the table of principal matters, tit. Accessories and Principals; and Burn, tit. Accessory; and Index to a Hawk. *P. C.* tit. Accessory and Principal.

C H A P. LVI.

Of accessories after the fact.

THIS kind of accessory after the fact is, where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon.

This,

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This, as hath been said, holds place only in felonies, and in those felonies, where by the law judgment of death regularly ought to ensue, and therefore there is no accessory in petit larceny, homicide *per insensum*, or homicide *se defendendo*. 15 E. 3. Coron. 116.

I shall consider, 1. What shall not be a receiving or relieving to make an accessory *after*; and 2. What shall be such a receiving or relieving to make an accessory *after*.

If *A.* knows that *B.* hath committed a felony, but doth not discover it, this doth not make *A.* an accessory *after*, but it is misprision of felony, for which *A.* may be indicted, and upon his conviction fined and imprisoned.

If *A.* sees *B.* commit a felony, but consents not, nor yet takes care to apprehend him, or to levy hue and cry after him; or upon hue and cry levied doth not pursue him, this is a neglect punishable by fine and imprisonment, but it doth not make *A.* an accessory *after*. 8 E. 2. Coron. 395. 3 E. 3. Coron. 293. Stamf. P. C. Lib. I. cap. 45. f. 40. [619] b. 14 H. 7. 31. b. and the contrary opinion of some old books in this case is therefore rejected.

If *B.* commits a felony, and comes to the house of *A.* before he be arrested, and *A.* suffers him to escape without arrest, knowing him to have committed a felony, this doth not make *A.* accessory; but if he takes money of *B.* to suffer him to escape, this makes him accessory, 9 H. 4. 1. and so it is if *A.* shuts the fore-door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes *A.* accessory; for here is not a bare omission, but an act done by *A.* to accommodate his escape. 8 E. 2. Coron. 427.

A. hath his goods stolen by *B.* if *A.* receives his goods again simply without any contract to favour him in his prosecution, or to forbear prosecution, this is lawful; but if he receives them upon agreement not to prosecute, or to prosecute faintly, this is theft-bote, punishable by imprisonment and ransom (*a*), but yet it makes not *A.* an accessory, 42 Affiz. 5. b. 3 E. 3. Coron. 353. Stamf. P. C. f. 40. a. but if he takes money of *B.* to favour him, whereby he escapes, this makes him accessory. Dalt. 263. (*b*), Crompt. 41. b.

A. hath his goods stolen by *B.* who sells them to *C.* upon a just value, tho' *C.* knows them to be stolen, this makes not *C.* accessory, unless he receives the felon. Dalt. cap. 108. p. 288. (*c*)

(*a*) *Vide ante*, p. 546. & notes *ibid.*
(*b*) *New Edit.* p. 531.

(*c*) *New Edit.* *ibid.*

But

But by some opinions, if he buy them at an under value, it makes him accessory, *per Crompt. 43. b.* and *Sir Nich. Hyde, Dalt. ubi supra*; but it seems this makes not an accessory, for if there be any odds, he that gives more, benefits the felon more than him that gives less than the value, but it may be a misdemeanor punishable by fine and imprisonment, and the buying at an under value is a presumptive evidence, that he knew they were stole, but makes him not accessory.

If *A.* hath his goods stolen by *B.* and *C.* knowing they were stolen, receives them, this simply of itself makes not an accessory, and therefore it hath been often ruled (*d*), that to say, *J. S. hath received stolen goods, knowing them to be stolen,* is not actionable, because it imports not felony, but only a trespass or misdemeanor, punishable by fine and imprisonment (*e*), for the indictment of an accessory *after*, is that he received and maintained *the thief, not the goods* (*f*).

But yet it seems to me, that if *B.* had come himself to *C.* and had delivered him the goods to keep for him, *C.* knowing that they were stolen, and that *B.* stole them, or if *C.* receives the goods to facilitate the escape of *B.* or if *C.* knowingly receives them upon agreement to furnish *B.* with supplies out of them, and accordingly supplies him, this makes *C.* accessory (*g*); and with this seems to agree the preamble of the statute of 2 & 3 E. 6. cap. 24. *Crompt. 41. b.* for it is relieving and comforting.

But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true

(*d*) *Dowson's case, Tolv. 4.*

(*e*) By 3 & 4 W. & M. cap. 9. " Receivers of stolen goods, knowing them to be stolen, are to be deemed accessories after the fact, and suffer as such;" but because these receivers often concealed the principal felons, and thereby escaped being punished as accessories; therefore by 1 Ann. cap. 9. " Whoever shall buy or receive stolen goods, knowing them to be stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment, tho the principal felon be not convicted;" and this shall exempt them from being punished as accessories, if the principal shall afterwards be convicted.

(*f*) But by 5 Ann. cap. 31. " If any person shall receive or buy knowingly any stolen goods, or knowingly harbour or conceal any felon, he shall be taken as accessory to the felon, and shall suffer as a felon;" this statute does not take away the benefit of clergy; but by 4 Geo. I.

cap. 11. such person may be transported for fourteen years.

(*g*) But because this was difficult to prove, the confederates of such thieves frequently disposing of such goods to the owners for a reward, under the notion of helping them again to their stolen goods, it is provided by 4 Geo. I. cap. 11. " That whoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as a felon, as if he himself had stolen the said goods, unless he cause such felon to be apprehended and brought to trial, and give evidence against him;" upon this clause the famous *Jonathan Wild* was convicted and executed. 10 Geo. I. —See statute 6 Geo. I. ch. 23. for pretending to help one to stolen goods. Receivers of linen goods stolen from the bleaching-grounds, are by the statute 18 Geo. II. declared felons, without benefit of clergy.

owner,

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owner, or till they are recovered or restored by law; and so it seems are the books to be intended of 27 *Affiz.* 69. 25 *E.* 3. 39. (4), 9 *H.* 4. 1. a.

If a felon be in prison, he that relieves him with necessary meat, drink, or clothes for the sustentation of life, is not accessory.

So if he be bailed out till the next sessions, &c. it is lawful to relieve and maintain him, for he is *quodammodo* in custody, and [621] is under a certainty of coming to his trial. *Crompt.* 42. 6. *Dalt.* p. 286. (i)

And therefore it is not treason thus to relieve a traitor, while he is in custody or under bail, and therefore the statute of 27 *Eliz.* cap. 2. that makes it felony to relieve a Jesuit, hath yet this qualification, *being at liberty and out of hold.*

But if a felon be in gaol, for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape makes the party an accessory, for the common humanity allows every man to afford them necessary relief, yet common justice prohibits all men unlawful attempts to cause their escapes.

If A. speaks or writes in favour of a prisoner for his favour and deliverance, this makes him not an accessory. 26 *Affiz.* 47.

To instruct a felon to read thereby to save him by his clergy makes not an accessory. *M. 7 R.* 2. (k), *Co. P. C.* cap. 64. p. 139.

If A. be committed for felony, and B. an attorney advise the friends of A. to write to the witnesses not to appear against him, who writes accordingly, this makes neither B. nor the friends accessory, but is a misdemeanor punishable by fine and imprisonment. *Co. P. C.* ubi supra.

A feme covert cannot be an accessory for the receipt of her husband, for she ought not to discover him.

But the husband may be an accessory for the receipt of his wife. *Stamp. P. C. Lib. I. cap. 19. fol. 26. a.*

If the wife alone, her husband being ignorant, do knowingly receive B. a felon, the wife is accessory and not the husband. 15 *E.* 2. *Coron.* 383.

But if the husband and wife both receive a felon knowingly, it

(b) In the last edition of the year-books, which is in this place mispaged, it is 25 *E. 3. 8a. b.*

(i) *New Ediz.* p. 530.
(ii) *Rev. 3°. Rev. Cons.*

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shall be judged only the act of the husband, and the wife acquitted.
M. 37 E. 3. Rot. 34. in derf. Rex. Coram Rege. (1)

To make an accessory to felony there must be a felony [622] committed by him, to whom he is accessory.

A. gives *B.* a mortal stroke, *C.* receives or relieves *A.* or helps him to escape, and then *B.* dies, *C.* shall not be an accessory to the felony, because when he received him no felony was done.

But a man may be accessory to an accessory by the receiving of him knowing him to be an accessory to felony. *Stamf. P. C. cap. 46. f. 43. b. 22 Affiz. 52.*

There can be no accessory in receipt of a felon, unless he know him to have committed a felony: *vide Stamford's P. C. 41. b.*

But yet it hath been held, that if the party be attaint of felony by outlawry or otherwise in the county of *A.* if any one of the county receive him, he is accessory, whether he had notice or not, because he is a felon by matter of record, whereof all in the same county ought to take notice. *12 E. 2. Coron. 377. Stamf. P. C. cap. 46. fol. 41. b.*

But it seems to me necessary to make an accessory after, that there be notice, altho the felon were attaint in the same county, for presumption shall not make men criminal, where the punishment is capital.

See ante, 612. ch. 55.

(1) This was the case of *Richard Day* and *Margery his wife*, (*vide supra p. 47.*) who had been indicted before the sheriff of Lincoln pro receptamento felonum; the indictment was sent coram rege: *Richard* surrendered himself and alleged, that he had been tried and acquitted on the said indictment before the justices of gaol-delivery at Lincoln, and was admitted to bail; after which the judge of gaol-delivery sent the record of *Richard's* acquittal; *Margery* the wife pleaded, that she also had been tried and acquitted, and was also bailed, but afterwards she not appearing a *Copies* was awarded against her and her bail: upon this her husband and one *John Hode* two of her bail came into court, *Et petunt ipsos admitti ad finem cum domino rege occasione praedictæ faciendum, & admittuntur;* sometime afterwards the said *John Hode* came into court and alleged, that he had been unjustly fined, "Quia praedictum iudicium super praedictam Margeriam factum minus suf-

"ficiens est, eo quod praedicta Margeria tempore, quo ipsa dictos felonies receptasse seu eis consentire debuisset, sicut cooperata praedicto Ricardo viro suo, & adhuc est & omnia sub potestate sua [eius], cui ipsa in nullo contradicere potuit, & ex quo non inferitur in indictmento praedicto, quod ipsa aliquod malum fecit, nec eis consentivit, seu ipsos felonies receptavit ignorantie viro suo, petit judicium, si ipsa vivente viro suo de aliquo receptamento in presentia viri sui occasionari posuit." The court took time to consider of this plea, and in Michaelmas term anno 4to gave the following judgment, "Vito & diligenter examinato indictmento praedicto super praefatam Margeriam factio videtur curia, quod indictmentum illud minus sufficientiens est ad ipsam inde ponere responsuram. Ideo cessit processus versus eam omnino. See Co. P. C. p. 108.

C H A P. LVII.

Concerning the order of proceeding against accessories.

THE accessory may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony.

If a man were accessory before or after in another county, than where the principal felony was committed, at common law it was disipunishable, but now by the statute of 2 & 3 E. 6. cap. 24. the accessory is indictable in that county, where he was accessory, and shall be tried there, as if the felony had been committed in the same county; and the justices, before whom the accessory is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainder.

This writing is to be by writ in the king's name under the *seal* of the justice so sending it. *Dy.* 253. b.

If the accessory be indicted either alone or together with the principal, process of outlawry shall not go against the accessory till the principal be attainted or outlawed, neither shall he be put to plead till the principal appear, but shall be bailed till the principal appear: *vide Westm.* 1. cap. 14. (a)

The accessory shall not be constrained to answer to his indictment, till the principal be tried, 9 E. 4. 48. a. but if he will waive that benefit, and put himself upon his trial before the principal be tried he may, and his acquittal or conviction upon such trial is good. *Stamf.* *P. C. Lib.* I. cap. 49. f. 46. b.

But it seems necessary in such case to respite judgment till the principal be convicted and attaint, for if the principal be after acquitted, [624] that conviction of the accessory is annulled, and no judgment ought to be given against him; but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. *8 H. 5. 6. b. Coron. 463.*

If *A. B.* and *C.* be indicted as principals, and *D.* is indicted as accessory to them all, *D.* shall not be arraigned till all the principals be

(a) *2 Co. Infus.* 183. This is now altered by *1 Ann.* cap. 9.

attaint

attaint or outlawed, fot if *A.* and *B.* be tried, and acquit or attaint, yet *D.* may be accessary to *C.* and not to *A.* nor *B.* but if *A.* *B.* and *C.* be indicted as principals, and *D.* indicted as accessary to *A.* only, there if *A.* be attaint, tho *B.* and *C.* be not, yet *D.* shall be arraigned. *40 Affiz. 25. Coron. 216. 7 H. 4. 36. b. Stamf. ubi supra.*

But yet the court may if they please arraign the accessary in the first case (*b.*), for if he be found accessary he shall have judgment, but if acquitted of being accessary to *A.* yet that acquittal dischargeth him not of being accessary to *B.* or *C.* and therefore when they come in and plead and are attaint, *D.* may be arraigned *de novo* as accessary to *B.* and *C.* *Plowd. Com. 98. b. Gittin's case.* So that it is in the discretion of the court to arraign him or not before *B.* and *C.* be attaint, tho it be the safer course to respite the arraignment of the accessary till *B.* and *C.* appear or are outlawed.

If *A.* be indicted or appealed as principal, and *B.* as accessary *before* or *after* by the same indictment, and the principal plead in bar or abatement, or *autrefoits acquit*, the accessary shall not be forced to answer, till that plea be determined, for if it be found for *A.* the accessary is discharged, if against *A.* yet he shall after plead over to the felony, and may be acquitted. *9 H. 7. 19. b.*

If *A.* be indicted as principal, and *B.* as accessary, they may be both arraigned together, and plead together, and put upon their trial by the same jury, and the jury shall be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessary; but if they find him guilty, then to inquire of the accessary, *Seigneur Sanchar's case (c), 40 Affiz. 8. 7 H. 4. 36. b. Coke super statute Westm. 1. cap. 14. (d);* but in that case judgment must be first given of the principal, for if any thing obstruct judgment, as clergy, a pardon, &c. the accessary is to be discharged. [625]

If *A.* be attaint of murder upon an appeal, and then *A.* is indicted of murder as principal, and *B.* as accessary, the principal pleads the former attainer, *B.* shall not be put to answer as accessary, because he is not attaint upon the same suit, and so it is if the attainer of *A.* were first upon the appeal. *7 H. 4. 36. a. Stamf. P. C. 47. a. Coke ubi supra.*

(b) To make this consistent with what goes before, we must understand the former passage to mean, that where he is indicted as accessary to all, he shall not be arraigned as accessary to them all till all be attaint or outlawed, and this, that the court may in

such case, if they please, arraign him only as accessary to him who is attaint, tho the others do not appear.

(c) *9 Co. Rep. 119. a.*

(d) *2 Co. Inf. 184.*

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If the principal be attainted and hath his clergy, or be pardoned after attainder, the accessory shall be put to answer; but if the principal be only convict and hath his clergy, or be pardoned, or stands mute, or dies in prison before judgment, or challenges above thirty-six peremptorily, the accessory shall not be put to answer, for the principal was never attainted (*e*), and altho formerly there were diversity of opinions in the books in these cases (*f*), yet the law is now settled as above (*g*), 4 *Cb. Rep.* 43, 44. *Biblio's case* and *Syer's case*, *Coke super Wefm.* 1. cap. 14.

If the principal be erroneously attaint, the accessory shall be put to answer, and shall not take advantage of the error in that attainder, 2 *R. 3.* 21, 22. but the principal reversing the attainder, reverseth the attainder of the accessory. 18 *E. 4.* 9. b.

If *A.* be indicted as principal, and *B.* as accessory *before* or *after*, and both be acquit, yet *B.* may be indicted as principal, and the former acquittal as accessory is no bar. 4 *E. 6. B. Coron.* 186. *Knightsley's case*, *Cromp. f. 43. a.*

But if *A.* be indicted as principal and acquitted, he shall [626] not be indicted as accessory *before*, and if he be, he may plead his former acquitted in bar, for it is in substance the same offence, *Stamf. P. C. Lib. II. cap. 36. fol. 105. a. 2 E. 3. Coron.* 150 & 282. but the antient law was otherwife. 8 *E. 2. Coron.* 424.

But if he be indicted as principal and acquitted, he may yet be indicted as accessory *after*, for they are offences of several natures. 27 *Affiz.* 10. 8 *H. 5. Coron.* 463. *Stamf. P. C. ubi supra.*

And so it is if he be indicted as accessory *before* and acquitted, yet for the same reason he may be indicted as accessory *after*.

(*e*) It was for this reason, that *Wefm.* the principal actor in the murder of Sir Thomas Overbury could not for a long while be prevailed with to plead, that so the earl and countess of Somerset, who were the movers and procurers might escape. See *State Tr. Vol. I. p. 314.*

(*f*) See *Coron.* 51, 58.

(*g*) But since our author wrote, it is settled quite otherwise by a *Stat. cap. 9.* for by that statute, "If any principal offender shall be convicted of felony, stand

" mute, or challenge above twenty, it
" shall be lawful to proceed against the
" accessory, either before or after the fact,
" in the same manner as if such principal
" felon had been attainted thereof, notwithstanding such principal felon be admitted to his clergy, or otherwise delivered before attainder; and every such accessory, if convicted, stand mute, &c. shall suffer the same punishment, as if such principal had been attainted.

C H A P. LVIII.

Concerning felonies by act of parliament, and first concerning rapes.

HAVING thus considered the felonies that are by the common law, I now proceed to the handling of felonies by act of parliament, and because it is hardly possible to reduce the titles of them under any dependent method, and difficult to digest them under heads, I shall take them up in order of time, according to the series and order of the reigns and years of the several kings wherein they were enacted, only where I meet with any felony in the time of any king's reign, I shall as near as I can bring together those Acts of Parliament both before and after, that concern that subject.

And first concerning rape.

Rape was antiently a felony, as appears by the laws of *Adelstane* mentiond by *Braeton*, *Lib. III. (a)*, and was punished by loss of life. [627]

But in process of time that punishment seemed too hard; but the truth is, a severe punishment succeeded in the place thereof, *viz.* castration and the loss of eyes (*b*), as appears by *Braeton* (who wrote in the time of *Henry III.*) *Lib. III. cap. 28.* but then, tho' the offender were convict at the king's suit, the woman that was ravished (if single) might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereunto, as appears by *Braeton ubi supra*.

This kind of punishment it seems continued till 3 *E. I.* and then by the statute of *Wesm. 1. cap. 13. (c)*, it was enacted, "That none
 " ravish or take with force a damsel within age with her consent
 " nor against her consent, nor no dame, damsel of age, nor any other
 " woman against her will; and if any do it, the party may sue with-
 " in forty days, and common right shall be done; and if none sue
 " within forty days, the king shall have the suit, and the party con-
 " vict shall suffer two years imprisonment, and be ransomed at the
 " king's pleasure.

(a) *De Corone, cap. 28. s. 147. c.*

Leg. Gal. I. I. 19. Will. Leg. Angl-Sax.

(b) By the laws of *William I.* this offence was punished with castration. *Vide p. 222 &c 290.*

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This statute gives a punishment by imprisonment and ransom only, if attaint at the king's suit, and takes away castration and putting out of eyes; but it seems as to the suit of the party, if commenced within forty days, it alters not the punishment before, *Le roy lui ferra common droiture.*

But by the statute of *Westm. 2. cap. 34. (d)* the offense of rape is made felony, "If a man ravish a married woman, dame, or damsel, where she neither assented before nor after, *Eyt judgment de vy & member*; if she assent after, yet the king shall have the suit.

This created rape a felony, and therefore it was not inquirable in a leet, for it was made felony *de novo* by this statute, *22 E. 4. 22. a. 6 H. 7. 4. b.*

[628] Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will. *Co. P. C. cap. 11. p. 60.*

The essential words in an indictment of rape are *rapuit & carnaliter cognovit*, but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit* are not sufficient in a legal sense to express rape. *1 H. 6. 1. a. 9 E. 4. 26. a.*

To make a rape there must be an actual penetration or *res in re*, (as also in buggery) and therefore *emissio seminis* is indeed an evidence of penetration, but singly of itself it makes neither rape nor buggery, but it is only an attempt of rape or buggery, and is severely punished by fine and imprisonment. *Co. P. C. cap. 10. p. 59.*

But the least penetration maketh it rape or buggery, yea altho there be not *emissio seminis*. *Co. P. C. ubi supra*; the old expression was *abstulit ei virginitatem*, and sometimes *pucellagium suum*. *Braft. Lib. III. (e)*

And therefore I suppose the case in my lord Coke's *12 Rep. 36. 5 Jac.* that faith, there must be both, *viz. penetratio & emissio seminis* to make a rape or buggery, is mistaken, and contradicts what he saith in his pleas of the crown; and besides, it is possible a rape may be committed by some, *quibus virgæ erexit adgit, & emissio seminis ex quodam defectu defit*, as physicians tells us.

If *A.* actually ravish a woman, and *B.* and *C.* were present, aiding, and abetting, they are all equally principal, and all subject to the

(d) & Co. Inst. 433.

(e) *De curia, cap. 28. s. 147. 6.*

fame.

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same punishment both at common law and since the statute of *Westm.*

2. *de quo infra.*

It appears by *Braeten ubi supra*, that in an appeal of rape it was a good exception, *quod ante diem & annum contentas in appello habuit eam ut concubinam & amicam, & inde ponit se super patriam*, and the reason was, because that unlawful cohabitation carried a presumption in law, that it was not against her will.

But this is no exception at this day, it may be an evidence of an afflent, but it is not necessary that it should be so, for the [629] woman may forsake that unlawful course of life.

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

A. the husband of *B.* intends to prostitute her to a rape by *C.* against her will, and *C.* accordingly doth ravish her, *A.* being present, and assisting to this rape: in this case these points were resolved, 1. That this was a rape in *C.* notwithstanding the husband assisted in it, for tho in marriage she hath given up her body to her husband, she is not to be by him prostituted to another. 2. That the husband being present, aiding and assisting, is also guilty as a principal in rape, and therefore, altho the wife cannot have an appeal of rape against her husband, yet he is indictable for it at the king's suit as a principal. 3. That in this case the wife may be a witness against her husband, and accordingly she was admitted, and *A.* and *C.* were both executed. 8 *Car. 1. Casus comitis Castlehaven.* (f)

If *A.* by force take *B.* and by force and menace compel her to marry him, and then with force *A.* hath the carnal knowledge of *B.* against her will, tho this marriage be voidable, yet it is not so simply void as to enable her to maintain an appeal of rape against *A.* for she may by her consent affirm this voidable marriage, and therefore in the like case, *Rot. Parl. 15 H. 6. n. 15.* there was a special act of parliament to enable the lady *Isabel Butler* to bring an appeal of rape against *William Pull* in that case notwithstanding that marriage; but that marriage had been dissolvable by a declaratory sentence in court christian, because obtained by a plain force; and if such a dissolution of the marriage had been obtained, then it seems to me, that, if the

(f) See *Mot. 115. Reg. Coll. Vol. II. p. 93—101. Same Tr. Vol. I. p. 365.*

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carnal knowledge of her were forcible and against her will as well as the marriage, that rape was punishable as well by appeal at the suit of the lady, as by indictment at the suit of the king, without the aid of an act of parliament, for it was really a rape, only the marriage

[630] *de facto* was an impediment of its punishment so long as *de facto* the marriage continued, but now that impediment being removed by the declaratory sentence, and the marriage made void *ab initio*, it is all one as if it had never been, and tho relation be a legal fiction and *intenta ad unum*, yet in this case the marriage and carnal knowledge being one intire act of force, and consecutive one upon another, in the real effect of that first force, it shall remain punishable as if there had been no marriage at all; but the statute of 3 H. 7. cap. 2, (g) hath provided a remedy in this case, so that this difficulty need not come in question.

An infant under the age of fourteen years is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it, and tho in other felonies *malitia supplet statem* in some cases as hath been shewn, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion.

But he may be a principal in the second degree, as aiding and assisting, tho under fourteen years, if it appear by sufficient circumstances, that he had a mischievous discretion, as well as in other felonies.

Thus far of the nature of rape, and who may be culpable of it. Now we will consider upon whom it may be committed, and some other considerations touching this fact.

It was doubted, whether a rape could be committed upon a female child under ten years old, Mich. 13 & 14 Eliz. Dy. 304. a. By the statute of 18 Eliz. cap. 7. it is declared and enacted, "That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, it shall be felony without the benefit of clergy.

My lord Coke adds the words, *either with her will or against her will*, as if were she above the age of ten years, and with her will, it should not be rape; bat the statute gives no such intimation; only declares that such carnal knowledge is rape.

[631] And therefore it seems, if she be above the age of ten years and under the age of twelve years, tho she consent,

(g) By this statute a forcible taking away and marrying a woman against her will is made felony.

it

it is rape. 1. Because the age of consent of a female is not ten but twelve. 2. By the statute of *Westm.* 1 *cap.* 13. *Roy defend, que nul ne ravise ne prigne a force damsel deins age, ne per son gree ne sans son gree;* and my lord *Coke* in his exposition upon that statute (*h*) declares, that these words *deins age* must be taken for her age of consent, *viz.* twelve years, for that is her age of consent to marriage, and consequently her consent is not material in rape, if she be under twelve years old, tho above ten years old, altho those words are by some mistake crept into my lord *Coke's* definition of rape, *Co. P. C. cap.* 11. but if she be above the age of twelve years, and consenting at the time of the fact committed, it is not felony.

But if she were above the age of twelve years, and consented upon menace of death, if she consented not, this is not a consent to excuse a rape. 5 *E. 4. 6. a. Dalt. cap.* 107. (*i*)

And therefore that opinion of Mr. *Finch* cited by *Dalton ubi supra*, and by *Stamford, cap. 14. fol. 24.* out of *Britton*, that it can be no rape, if the woman conceive with child, seems to be no law, *mulier enim vi oppressa concipere potest.*

If the woman consented not at the time of the rape committed, but consented after, she shall not have an appeal of rape by the statute of *Westm.* 2. *cap.* 34. but yet the king shall have the suit by indictment, and by the statute of 6 *R. 2. cap.* 6. if she have a husband, he shall have an appeal, and if she have none, then her father or other next of blood shall have an appeal of such rape; and by the same statute as well the ravisher as the ravished, that so assented, are disabled to have any dower, inheritance or jointure; and the next of blood of such ravisher or assenting ravished, to whom their lands should revert, remain or fall after their death, shall enter upon the same, and hold it as an estate of inheritance.

But an assent after through menace of death is not such an assent, as incurs this penalty; *quod vide 5 E. 4. 6. a.*

As in other felonies, so in this there are or may be accessaries before and after, for tho this be a felony by act of parliament, that speaks only of those that commit the offense, yet consequentially and incidentally accessaries before and after are included, and so in every new statute making a felony without speaking of accessaries before or after. *Co. P. C. cap.* 10. p. 59. and so in buggery.

(*h*) 2 *Instit.* 182.

(*i*) *New Edw. cap.* 160. p. 524.

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And note, that at the time of the making of the statute of 13 E. I. rape was not felony, for it had long continued under the nature only of a misdemeanor and not a felony, and therefore it is not at this day inquirable in a leet, because it is a felony newly created. 6 H. 7. 4. b. 22 E. 4. 22. a.

The regular means of bringing this offense to judgment was either at the suit of the king by indictment, or at the suit of the party by appeal.

The indictment ought to have these ingredients, 1. It must be felonie. 2. It must be *rapuit & carnaliter cognovit*. 3. It must conclude *contra formam statuti 13 & 14 Eliz. Dy. 304. a.*

It may be prosecuted by indictment at any time, *for nullum tempus occurrit regi.*

An appeal of rape lies for the party ravished, and if she consent after the rape, she is barred of her appeal, and her husband, if married, or the next of kin, if single, may have the appeal by the statute of 6 R. 2. cap. 6.

If the next of kin were the ravisher, his next of kin shall have the appeal by the equity of the statute of 6 R. 2. 28 H. 6. Coron. 459.

As to the appeal of the party ravished two things are necessary, 1. That she make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned; this *Braeton at large* describes Lib. III. cap. 28. f. 147. a. *Cum igitur virgo corrupta fuerit & oppressa, statim cum factum recens fuerit cum clamore & huteo debet accurrere ad villas vicinas, & ibi injuriam sibi illatam probis hominibus offendere, sanguinem & vestes suas sanguine tintelas & vestium scissuras, & sic ire debet ad praeposum hundredi & ad servientem domini regis, & ad coronatores & vicecomitem, & ad primum comitatum faciat appellum, &c.* [633] 2. That the appeal be speedily prosecuted, for it seems, that a year and a day be not allowd in this appeal, but some short time, tho it be not defined in law what time, but lies much in the discretion of the court upon the circumstances of the fact, yet the statute of Westm. 1. cap. 13. allowd but forty days: long delay of prosecution in such a case of rape always carries a presumption of a malicious prosecution. 3. If the wife hath once consented after, her appeal is barred.

By the statute of 18 Eliz. cap. 7. the principals in rape are ousted of clergy, whether they be principals in the first degree, viz. he that

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committed the fact, or principals in the second degree, *viz.* present aiding, and assisting; but accessaries *before* and *after* have their clergy.

Touching the evidence in an indictment of rape given to the grand jury or petit jury.

The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.

For instance, if the witness be of good fame, if she presently discovered the offense made pursuit after the offender, shewed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

If the rape be committed upon a child under twelve years [634] old, whether or how she may be admitted to give evidence may be considerable. (*)

(*) For she might at that age maintain an appeal *pro raptu*, *Pascb.* 33 E. 1. Rot. 16. *in dorsi*. *London. Coram Rege.* James Pochein merchant was attached, and brought *Coram Rege* to answer to *Isabel* daughter of *Emma de Langeleye de raptu & face regis fratris*, who appeal'd him after this manner, *per quendam narratorem suum dicens*,—*Isabella filia Emmae de Langeleye, de cætate novem annorum & dimidiis dicit*, *quod prædictus Jacobus die dominicali proximâ post festum sancti Martini, anno R. R. E. 33, apud London in altâ fratri regis ex opposito ecclesie sancti Benedicti de Scherhog bordo vespertinali ipsam Isabellam cepit, & in quâdam tabernâ suâ portauit, & contra pacem domini regis cum eâ concubuit, & virginitatem suam rapuit; & petit quod justitiarii domini regis super hoc fibi faciant justitiam & remedium.* *Et queritur,* *quid prædicta transgressio fibi facta fuit die 30 anno predictis ad dampnum ipsum Isabellam centum librarum, &c.* *Et prædictus Jacobus venit, & defendit omnem fictionem, raptum, &c.* *Et petit allocantiam de appello ipsius Isabellæ, defensum ipsum Jacobum per verba in appello usualia, & necessaria, ac convenientia, non appelleat.* *Et quia cogitat curia quid appellum, &c. insufficientem est, consideratum est, quid prædicta Isabella constitutatur marescallo;* *& postea ei remittitur persona, & prædictus Jacobus quoad appellum ipsius Isabellæ est imperpetuum quietus, &c.* He was then arraigned at the king's suit *de raptu prædicto*, and was tried, and convicted; but the king afterwards remitit prædictis Jacobo judicium vita & membrorum; & quod faciat redemtionem pro delicto prædicto, & finem fecit cum domino rege per centum libras.

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It seems to me, that if it appear to the court, that she hath that sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn; thus we find it done in case of evidences against witches, an infant of nine years old was sworn. *Dalt. cap. 111. p. 297. (k)*

But if it be an infant of such tender years, that in point of discretion the court sees it unfit to swear her, yet I think she ought to be heard without oath to give the court information, tho singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are, 1. The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, tho there may be other concurrent proofs of the fact when it is done. 2. Because if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a nar-

[635] rative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered.

But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant.

For in many cases there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witnesses as well as the truth of the fact; it is one thing, whether a witness be admissible to be heard, another thing, whether they are to be believed when heard.

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

I shall never forget a trial before myself of a rape in the county of *Suffex.*

There had been one of that county convicted and executed for a rape in that county before some other judges about three assizes before, and I suppose very justly: some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself, furnished the two assizes following with many indictments of rapes, wherein the parties accused with some difficulty escaped.

At the second assizes following there was an antient wealthy man of about sixty-three years old indicted for a rape, which was fully sworn against him by a young girl of fourteen years old, and a concurrent testimony of her mother and father, and some other relations. The antient man, when he came to his defense, alledged that [636] it was true the fact was sworn, and it was not possible for him to produce witnesses to the negative; but yet, he said, his very age carried a great presumption that he could not be guilty of that crime; but yet he had one circumstance more, that he believed would satisfy the court and the jury, that he neither was nor could be guilty; and being demanded what that was, he said, he had for above seven years last past been afflicted with a rupture so hideous and great, that it was impossible he could carnally know any woman, neither had he upon that account, during all that time carnally known his own wife, and offered to shew the same openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into some room to inspect this unusual evidence; and they accordingly did so, and came back and gave an account of it to the court, that it was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down in those parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat, whereupon he was acquitted.

Again, at *Northampton* assizes, before one of my brother justices upon the *Nisi prius*, a man was indicted for the rape of two young girls not above fourteen years old, the younger somewhat less, and the rapes fully proved, tho' peremptorily denied by the prisoner, he was therefore to the satisfaction of the judge and jury convicted; but before judgment it was most apparently discovered, that it was but a malicious

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malicious contrivance, and the party innocent ; he was therefore reprieved before judgment.

I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance ; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.

See 4. Black. Com. ch. 15. page 210—215. Burn. Tit. Rape, 1 Hawk. P. C. 108. Pollock de pace Regis 134. 2.

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C H A P. LIX.

*Concerning the felony de uxore abductâ sive raptâ cum bonis viri,
super statutum Westm. 2. cap. 34.*

TH E words of the statute are, *De mulieribus abductis cum bonis
virorum suorum habeat rex seclam. de bonis sic asportatis.*

This part of the statute hath affinity with what goes before in the same statute concerning rape ; and tho this learning hath been long antiquated, yet it is of use to be known.

If a wife goes away of her own consent with another man, and takes with her the goods of the husband, this seems to be felony neither in the man nor in the wife, tho *Dalt. cap. 108. p. 266. (a)* takes it to be a felony in the man that takes her and the goods ; but it is a trespass, for which at common law the husband may have an action of trespass, *quare uxorem suam cepit & abduxit cum bonis viri.*

But if *A.* takes the wife of *B.* against her will with the goods of her husband, but doth not actually ravish the wife, it is felony as to the goods, for which the party may be indicted ; but as to the taking away of the wife it is but a trespass, for which the husband may have his action of trespass at common law, *quare uxorem suam rapuit & eam cum bonis & catallis ad valent', &c. abduxit & adhuc detinet,* and in that action shall recover damages for the taking of his wife and goods at common law.

(a) *New Edit. p. 504*

But

But it should seem, that he might have his action grounded upon the statute of Westm. 2. which differs only in this from a trespass at common law, 1. That the trespass at common law is *pone per vadim*, &c. but this is *attachies*, 14 H. 6. 2. b. Again, 2. The writ at common law is general, but this upon the statute concludes *contra formam statuti, quod vide Fitz. N. B. 89. 9 H. 6. 2. a.* [638]

But without question, if the wife were actually ravished and the goods taken, this action lies for the husband, and he shall recover damages for the rape as well as the goods, tho the wife were dead or divorced after the rape. 44 Affiz. 13. 47 E. 3. *Action sur statute* '37.

And it seems such an action was antiently in the nature of an appeal of rape and robbery grounded upon the statute of Westm. 2.

And by the antient law (the defendant being convicted in a writ founded upon this statute, as before, was to have judgment of death, which appears most evidently by the ordinance of parliament, Rot. Parl. 8. E. 2. M. 3. and afterwards sent by *Mutimus* into the king's bench, T. 11 E. 2. Rot. 4. London, which recites, that in such case the defendant was not bailable, *Eo quod idem implacatus, si hujusmodi transgressione convictus fuisset, suspensioni adjudicari deboret*, and therefore provides, that the defendant, if of good fame, shall be bailed.

And according to this are the books 13 Affiz. 5. 15. E. 3. *Utilegarie* 49. *Coron.* 122. 18 E. 3. 32. a. and a case of a vioar cited to be 13 E. 2. who had his clergy in this case, but it should seem it was intended, 1. When a rape was actually committed, *vide* 44 Affiz. 13. and 2. When the action was grounded upon the statute, and not barely at common law.

But the law hath been long disfused to give a capital judgment upon this writ, and in process of time nothing, as it seems, was recovered but damages, tho the writ were brought upon the statute, for *raphe* is now intended of a simple taking. 9. *Eliæ Dy.* 256. b. 2 *Cœ. Infist.* 435. *super Westm. 2. cap. 34.* 43 E. 3. 23. a.

And it seems the law was accordingly taken, for the statute of 6 R. 2. cap. 6. gives an appeal to the husband for the rape of his wife in some cases, which it needed not have done, if by the law, as it was then used, the husband might upon such a writ convict the party, and obtain judgment of death against him.

And besides, it was very inconvenient, that in a civil action formed for damages, and that wants the material [639]

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terms of law to express a felony, (namely *carnaliter cognovit* and *felonie*) judgment of death should be given, and so this course expired of itself.

C H A P. LX.

Of felony by purveyors taking victuals without warrant.

BY the statute of *Articuli super Cartas*, cap. 2. It is enacted, Si nul face prises sans garrant, & les emport encouure volant de ce lui, a qe les biens sont, soit maintenant arrest per le will, ou le prise sera fait, & amesne al prochein gaal: Et si de ceo soit attaint, soit fait de lui, come de laron, si la quantite de biens le demand.

If *A.* having no commission take goods by pretense of a commission as purveyor, and the party not knowing that he hath no commission sell and suffer him to take it, yet this is felony; but if the owner knew he had no commission, and yet willingly sell it to him as a purveyor, and he take and carry it away, this is not a carrying away against the consent of the owner to make a felony within this statute. *2 Co. Instit. p. 546. super Articulis, cap. 2.*

This point of felony is confirmed by the statute of 18 E. 3. cap. 7. and 4 E. 3. cap. 4.

Afterwards by the statute of 5 E. 3. cap. 2. and 25 E. 3. cap. 1.
" If a purveyor shall take goods above the value of twelve-pence
" without testimony and appraisement of the constable, or without
" tallies given, this is also felony.

[640] Again, by the statute of 25 E. 3. cap. 15. " If a purveyor
" take sheep and their wool betwixt Easter and Midsummer,
" it is felony, if he shorn them at his own house.

Again, by the statute of 36 E. 3. cap. 2. " If any purveyor take
" goods or carriage, otherwise than is contained in their com-
" mission, it is felony.

But in all these felonies the offender is not ousted of clergy, but
he shall have it: *vide Co. P. C. cap. 24.*

But these acts of parliament and the punishment of purveyors is
now out of date, because by the statute of 12 Car. 2. cap. 24. all pur-
veyance is taken away.

Only

Only by two subsequent acts, namely 13 Car. 2. cap. 8. and 14 Car. 2. cap. 20. there is a special purveyance of carriage settled for the king's household, and for the navy and carriage of ordnance; but the statute of *Articuli super cartas*, and the other statutes making felony in case of undue purveyance do not concern this new established purveyance, because settled in another way; and therefore I shall say no more touching this matter.

C H A P. LXI.

Concerning the new felonies enacted in the times of E. 2. E. 3. and R. 2.

IN the times of those kings there were but few new felonies enacted other than those touching purveyors, whereof in the former chapter.

By the statute of 1 E. 2. *De frangentibus prisionam*, the law was settled in that point, whereof I have said sufficient *supra*, cap. 54.

By the statute of 14 E. 3. cap. 10. "If a gaoler or under keeper by too great dures of imprisonment, and by pain make any prisoner in his ward to become an appellor against [641] his will, and thereof be attaint, he shall have judgment of life and member.

These words in any act of parliament *Eis judgment de vy & member* create a felony.

This act extends to a gaoler *de facto*, tho he be not a gaoler *de jure*.

The offender hath the benefit of clergy: *vide Co. P. C. cap. 29. p. 91.* touching this felony.

By an act *Rot. Par. 17 E. 3. n. 15.* but not printed, the importation of false and evil money is prohibited under pain of life and member, and the exportation of coin or bullion prohibited under pain of forfeiture, and if the searcher be of confederacy with the exporter, it is enacted to be felony in the searcher.

If it be said this act was needless to make importation of false money felony, because declared treason by the statute of 25 E. 3. the answer is obvious. By the act of 17 E. 3. before-mentioned licence was

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was granted to *Dutch* merchants and others to import their own coin so it were as good as *Sterling*, and that, if they pleased, the merchants might trade between themselves with that foreign money; and it was necessary in respect of that foreign money to impose a new penalty upon the importers of false money of that kind, because that foreign coin was not within the statute of 25 *E. 3.*

But this seems to be but a temporary law during that special intercourse between the *English* and *Dutch*, and besides by subsequent statutes the penalty of treason is annexed to the importation of counterfeit coin made current by proclamation: *quod vide supra, cap. 20. p. 225.*

By the statute of 27 *E. 3. cap. 3.* of the staple, the exportation of wools, wool-fells, leather or lead by any *English*, *Irish*, or *Welshman*, is prohibited under pain of loss of life and member, and for forfeiture of lands and goods (*a*), but this was repealed by the statute of 36 *E. 3. cap. 11.* whereby it was enacted, that merchants denizens may pass with their wool as well as foreigners without being restrained.

[642] But yet this was not full enough, and therefore by the statute of 38 *E. 3. cap. 6.* there was a fuller repeal of the statute of 27 *E. 3.* as to the point of felony, yet the forfeiture of lands and goods continued upon merchants denizens, and the statute of the staple was confirmed in all points by 38 *E. 3. cap. 7.*

But by the statute of 43 *E. 3. cap. 1.* the staple of *Calais* was abolished, yet by 14 *R. 2. cap. 5.* exportation of wool, wool-fells, leather and lead are prohibited to denizens under pain of forfeiture of them.

By the statute of 27 *E. 3. de provisoriis, cap. 5.* ingrossing of *Gascoign* wines made felony, but that penalty repealed by the statute 37 *E. 3. cap. 16.*

So that these statutes stand now repealed.

But yet by the statute of 18 *H. 6. cap. 15.* the carrying of wool or wool-fells out of the realm to other places than to the staple of *Calais* without the king's licence is felony, excepts wools carried to the straits of *Morocco*.

This statute is supposed by my lord *Cake, P. C. cap. 32* to be in force, but that being doubted, because the staple of *Calais* then in use hath been long since abolished, a new provision and a better is made by acts of this present parliament (*b*).

(*a*) *Co. P. C. p. 95.*

(*b*) *12 Car. 2. cap. 32. 13 & 14 Car. 2. cap. 18.*
But

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But whether that act be in force or not, the offender was not thereby excluded of the benefit of clergy.

By the statute of 34 E. 3. cap. 22. the concealing and taking away of an hawk was two years imprisonment; but by the statute of 37 E. 3. cap. 19. the stealing of a falcon, tercelet, lanner, or laneret is made felony.

See the commentary *Co. P. C. cap. 34.* where it is declared, that this act extends only to falcons, and those of that kind.

The proof intended by this act is not by jury but by circumstances, as varvels, &c.

The offender is within benefit of clergy.

As to the laws in the time of *Richard II.*

6 R. 2. cap. 6. concerning the punishment of rape, *de quo satis,* cap. 58.

7 R. 2. cap. 8. of purveyor, *de quo supra, cap. 60.*

By the statute of 13 R. 2. cap. 3. " If any man bring [643] or send into this realm or the king's power any summons, sentence or excommunication against any person for the cause of making motion, assent or execution of the statute of provisors, he shall be taken, arrested, and put in prison, and forfeit all his lands, tenements, goods and chattels for ever, and incur the pain of life and member; and if any prelate makes execution of such summons, sentence or excommunication, his temporalities shall be taken and abide in the king's hands till due redress made.

" And if any person of less estate than a prelate makes such execution, he shall be taken and arrested and imprisoned, and make fine and ransom by the discretion of the king's council.

The bringing in of bulls of this nature is against the common law, and sometimes antiently punished as high treason, *Vide Co. P. C. cap. 36. & libros ibi.*

But now by the statute of 13 Eliz. cap. 2. the offense as well in the bringers in, as executors of these bulls, &c. is made high treason, as well in persons ecclesiastical as temporal.

There is nothing else in these kings reigns that enacts a new felony, only some statutes directing the process and jurisdiction, whereby felonies may be tried, as 13 R. 2. cap. 2. of the constable and marshal, &c.

C H A P. LXII.

*Concerning the new felonies enacted in the times of H. 4. H. 5. H. 6.
E. 4.*

BY the statute of 5 H. 4. cap. 4. it is ordained, " That none from thenceforth shall use to multiply gold or silver, nor use the craft of multiplication, and if any do, he shall incur the pain of felony in this case (a).

And the reason of this act was not because they thought the real transmutation of metals into gold or silver was feasible, but the reason is given in the petition of the commons. *Rot. Car. 5. H. 4. n. 63.*

Car plusers homes par colour de cest multiplication font faux mony a grand deceit du roy & damage de son people: vide tamen Co. P. C. cap. 20. dispensations granted to particular persons by 34 & 35 H. 6. for the using of this art with a *non obstante* of the statute of 5 H. 4.

The offender is to have his clergy.

And altho the statute mentions not accessaries before or after, yet this statute making the fact felony doth consequentially subject accessaries before and after to the penalty, tho this be made a *quare. Dy. 88.* in *Eden's case*; yet it seems now settled according to the opinion of my lord *Coke*, *P. C. cap. 20.* that there may be accessaries to this new felony before and after.

By the statute of 5 H. 4. cap. 5. cutting the tongues or [645] putting out the eyes of the king's subjects of malice prepensed is enacted to be felony.

This was extended to other dismembering, as cutting off ears, by 37 H. 8. cap. 6, but by an a^ct of this present parliament (b) this and

(a) The offense prohibited by this act was not the extracting gold or silver out of lead or other metals, which is now known by the name of refining, for that is not the multiplication of gold or silver, but only a separation thereof from the coarser metal, but the design of the act was to prohibit the transmutation of one metal into another, which was pretended to be done by the philosopher's stone or elixir, whereby great numbers were bubbled and cheated; but however, because some persons were (groundlessly) afraid to exercise the art of smelting and refining metals, lest they should fall under the penalty of this statute,

it was therefore repealed by 1 W. & M. cap. 90. provided that the gold or silver extracted by the said art be carried to the Tower of London for the making of monies, and be not otherwise disposed of.

(b) 22 & 23 Car. 2. whereby the cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting off a nose or lip, cutting off or disabling any limb or member, if done with an intention to maim or disfigure, is felony without benefit of clergy; upon this statute *Coke* and *Wodburne* were convicted and executed for slitting the nose of Mr. *Crispe*, 8 Geo. I. See *State Tr. Vol. VI. p. 812.*

some

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some other dismembers are made felonies out of the benefit of the clergy.

By the statute of 3 H. 5. cap. 1. "If any person do make, buy, coin, or bring into the kingdom Galli-half-pence, Sufkins or Dod-kins, to sell, or put them in payment in this realm, it is felony.

And by the statute of 2 H. 6. cap. 9. If any man pay or receive the money called Blanks, it is also felony; but both these are within clergy, and by the whole disuser of these coins these statutes are of little use.

By the statute of 3 H. 5. cap. 3. it is enacted, "That proclamation shall issue, that all Britons depart out of the realm before the feast of St. John Baptist next, upon pain of loss of life and member.

But this was but a temporary law and expired.

By the statute of 3 H. 6. cap. 1. it is enacted, "That no congregations or confederacies be made by masons in their assemblies, whereby the good order of the statute of Labourer's is violated; and they that cause such assemblies to be holden, shall be adjudged felons.

But the statute of Labourers being repeal'd by the statute of 5 Eliz. cap. 4. this law is consequentially repeal'd. Co. P. C. cap. 35. p. 99.

By the statute of 8 H. 6. cap. 12. it is enacted, "That if any record or parcel of the same, writ, return, panel, process, or warrant of attorney in the king's courts of chancery, exchequer, the one bench or the other, or in the treasury, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by any other person, by cause whereof the judgment shall be reversed; [646] that such stealer, taker away, withdrawer, or avoider, their procurators, counsellors, and abettors thereof indicted, and by process thereupon made, duly convict upon their own confession, or inquest thereupon taken of lawful men, half whereof shall be of men of any court of the same courts, and the other half of others, shall be judged for felons; and that the judges of the same courts, or of the one bench or the other, have power to hear and determine such defaults before them, and thereof to make due punishment, as is aforesaid.

In the consideration of this statute, it will be convenient to examine
1. How the law stood in reference to the matters aforesaid before this act made. 2. What is the import of the several parts of this act.

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At the common law, the undue rasure, or embezzling of a record was a great offense, for which even a judge himself was punishable by fine and imprisonment. 2 R. 3. 10. *Hengham* a judge was fined eight hundred marks for raising the record of a fine of thirteen shillings and four pence imposed upon a poor man, and reducing it to six shillings and eight pence. (c)

By the statute of *Westm.* 1. *viz.* 3 E. 1. cap. 29. it is enacted,
“ That if any serjeant, pleader or other, do any manner of deceit or
“ collusion to the king's court, or consent to it in the deceit of the
“ court, or to beguile the court or the party, and be thereof attaint,
“ he shall be imprisoned for a year and a day, and from thenceforth
“ shall not be heard to plead in that court.

And if he be no pleader, he shall be imprisoned in like manner, and if the trespass requires greater punishment, it shall be at the king's pleasure. (d)

[647] Upon this act it was that *Robert de Greshope* a common attorney was imprison'd for a year and a day, and banished the court of common pleas, for embezzling a part of a record, *viz.* T. 19 E. 1. Rot. 57. *in dorso*, C. B. mention'd in Co. P. C. cap. 19. p. 71. *vide simile*, H. 22 E. 1. Rot. 33. *in dorso*. *Cant. Coram Rege.* (*)

T. 5 E. 3 Rot. 13. *in dorso*. *Rex. B. R.* *Thomas of Carleton* convict of the rasure of the word *et* in a writ, is committed to the marshal, & *inhibitum est ei, ne amodo deseruiat in officio sive servitio vice-com'*, *periculo quod incumbit*, and this it seems was upon the same act of 3 E. 1. (e)

If a clerk had made a misentry of record, the judge, before whom it was, might, *ore tenus*, rectify that misentry, tho' a considerable time after.

M. 24 E. 3. Rot. 41. *Kanc. Rex.* it was presented before *Richard de Kellehull*, and his fellow justices of oyer and terminer, 18 E. 3.

(c) *Hengham* was a judge in the reign of *Edward I.* and his fine was employed for building a clock-house at *Westminster*, and furnishing it with a clock, which made *Southcot* (one of the judges of the king's bench in the reign of queen *Elizabeth*), when prest by the chief justice to consent to a rasure of the roll, say, that he would not do it, *for he meant not to build a clock-house*. Co. P. C. p. 72.
(d) 2 Co. Insti. 213.

(*) This was the case of *Giles de Berne*, who was convicted, *eo quod scienter procuravit omissionem dicti in processu & recordo causa iustificariis de banco, quod coram rege venire fecit*; on account of which omission the judgment of the court of common pleas had been reversed, *pro deceptione predicta committitur marescallus, & postea finem factum cum domino rege pro 10 solidis*.

(e) It does not appear from the record, whether the judgment was grounded on statute 3 E. 1. or on the common law.

that

that one *Warehus atte Capele* had trespassed in the free warren of the earl of *Huntingdon*, and the abbot of *Battel*, and he was convicted by his own confession, and the clerk had entred the fine ten shillings. The record being sent into the king's bench, *Richard de Kellehule* came into court, & inspecto irrotulamento, said, *Quod clericus suus finem illum surreptivè & contra recordum suum intravit, & dicit quod finis ille affessus fuit per ipsum & socios suos pro quolibet articulo ad decem libras, & sic finis ejus eiusdem Warehusi summatus fuit ad viginti libras, & illud expressè ore tenus hic recordatur*, and prayed for the king, *quod finis ille secundum recordum suum intretur in rotulis extractorum*, and it was accordingly entred; so that a judge of record is as it were a living record, and controuls the entry of the clerk.

In the time of *Richard II.* there happened two great complaints against the judges and clerks for the misentry of a record: the one *Rot. Par. 7 R. 2. pars 1. n. 57.* for the lady *Spencer*, who pleaded to a *Quare Impedit* brought against her by the king; [648] but at the end of *Trinity* term last, the record of her plea was rased in a material place to her great disadvantage, and the judges refused to amend it, because after the term: the answer was,

Tiel plee come les justices voillent recorder qe ent estoit pledez, soit de novel entre en le lieu de la rasure, nient contrefeant qe le terme, en quel le dit plee fuit pled, soit ja pas, & roy voit qe celui, qe fist la rasure, soit punish pur son malfait.

The other was *Rot. Par. 7 R. 2. pars 2. n. 20.* at the complaint of the prior of *Mountague*, That whereas in a writ of right brought against him he prayed in aid of the king, and was ousted of aid by the court, who entred *quaesitum est a Priori, si quid, &c.* the judgment that was given was *dictum est Priori, quod respondeat sine auxilio*; and accordingly the judges came into parliament and agreed, that new entries should be made, as was desired by the prior, and thereupon the prior brought a writ of error in parliament upon the record so amended.

These occurrences did the next parliament following, viz. *8 R. 2.* draw on the act of *8 R. 2. cap. 4.* against the rasing of records, and the false entring of pleas, whereby it is enacted, "That if any judge or clerk be of default (so that by the same default ensueth disherison of any of the parties) sufficiently convict before the king and his council, in that way that the king and his council shall deem reasonable, within two years after the default made, &c. he shall

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" be punished by fine and ransom at the king's will, and satisfy the party.

Thus this act settled it, and so it stood till 8 H. 6. but in this act there occurred some inconveniences. 1. The way of trial before the king and council was difficult and inconvenient. 2. The punishment as to the clerks seemed too gentle. 3. It did not meet with the inconveniences of stealing records. 4. It was found of great inconvenience to the due administration of justice; for the judges have often occasion upon their own memory of the record, and sometimes upon examination, to rectify undue entries, and were [649] required in some cases to amend the misentries, or small mistakes in records by the statute of 14 E. 3. cap. 6. and other statutes, which could not be done without rasures and alterations of the record and roll.

To remedy the latter of these inconveniences in the beginning of this very statute of 8 H. 6. cap. 12. and farther by the statute of 8 H. 6. cap. 15. a liberal power is given to the justices to amend records, in the puruance of which power they were by these acts of 8 H. 6. protected against the dangers and severity of the act of R. 2.

And then this act proceeds to inflict punishment of felony against clerks and others, that willingly avoid records, &c. which penal law did not at all extend to judges upon three apparent reasons. 1. Because by this very law, judges had power upon examination to amend records. 2. Because the judges of the feneral courts are made the judges to hear and determine these offenses. And, 3. This clause not mentioning judges (as that of 8 R. 2. did); but beginning with clerks and other persons, judges shall not be included, who are superior officers, upon the reaon given in the 2 Co. Rep. *casus archiepiscopi Cant'*, and accordingly it is agreed by my lord Coke, P. C. cap. 19. p. 72.

Now I come to the consideration of the statute itself, wherein my lord Coke, P. C. cap. 19. hath made a full collection, to which I can add little.

1. It extends only to the four great courts of *Westminster*, and not to inferior courts.

But as to the *English* part of the court of chancery, it extends not, because as to the *English* proceeding it is no court of record.

But yet it seems it doth extend to those processses, that issue out of that court under the great seal, tho' they be processses in order to the *English*

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English proceeding, as *subpæna's*, attachments, commissions to examine witnesses, because these being under the great seal, are matters of record.

2. The *Treasury* is added, which doth not only extend to the records of the treasury of the courts of king's bench and common pleas, but also to the records in the receipts of the exchequer, under the custody of the treasurer and chamberlains [650] of the exchequer: and also to the records in the *Tower*, and in the chapel of the rolls, yea, and the records in the custody of the clerk of the lords house in parliament, (but not to the journals,) for those are the king's treasures of records of the highest moment.

3. The offenses mentioned are four, *stealing, carrying away, withdrawing, or avoiding*; and this last word *avoiding* is comprehensive, for it extends to rasing, cutting off, clipping, yea, and cancelling a record.

4. But these must be done *voluntarily*, as well as *feloniously*, and both these words must be contained in the indictment upon this statute.

A rasing or cancelling of a record by the order of that court in whose custody the record is, is no felony in him that doth it, nor in the court that commands it, for the court hath a superintendence, as well over the record as over the clerks.

5. It extends not to judges for the reasons before given.

6. It must be such an embezzling or avoiding of the record, by reason whereof a judgment is reversed, and therefore it extends only to judicial records in any of those four courts or treasuries, be the judgment in a case criminal or civil.

.. And therefore it is equally an offense against this statute whether the avoiding, &c. be after judgment given or before, in case judgment be given after the offense; and it is held, that an outlawry, tho' it be *per judicium coronæ*, is a judgment within this statute.

If the judgment be not actually reversed by such embezzling, &c. yet if it be reversible by reason thereof, it is within this statute, 2 R. 3. 10.

And it extends not only to a reversibleness by writ of error, but a reversibleness or avoidableness of judgment by plea, by reason of such embezzling, &c. is within this statute, 2 R. 3. 10.

But what if the offense of embezzling, avoiding, or rasing, be such as goes in affirmance of the judgment, and makes it good,

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which otherwise were reverible, if it stood as before that offense committed? tho this in some cases be punishable by the court as a misdemeanor in the clerk, yet it seems not felony within this act.

And the common practice at this day is, if the *Venire facias* or *Distringas* be erroneous, and would make the judgment erroneous, if filed, but being not filed, is aided by the statute of 18 *Eliz. cap. 14.* the court never compels the clerk to file such writs after verdict, much less punishes them for not doing it.

But if *A. B.* be sued by the original to the *exigent* and outlawed, and afterwards the *exigent* is made *C. B.* and the original is also made *C. B.* to make all agree, this is felony as well in the clerk that raseth the original, as him that raseth the *exigent*. 2 *R. 3. 10.*

7. If the offense riseth in two counties, then it is dispu[n]ishable. 2 *R. 3. 10.*

8. The trial is to be one half by the clerks of the court, and the other half by others.

9. The judges of the court of the one bench and the other are by this statute enabled to hear and determine it without any other commission, and each of these courts have a concurrent jurisdiction, and where it first begins there it is to proceed.

So that it seemeth, if the offense were in the record of the king's bench, the justices of the common bench may hear and determine the offense, if it be there first indicted.

This power is to hear and determine; the consequence whereof is, that it enables these respective courts to take indictments of these offenses; this, tho it be intrinsical to the court of king's bench, (for they swear a grand inquest and take indictments every term,) yet it is a new power in the common bench.

And altho the trial of the offense is to be a party-jury of clerks and others, yet the indictment may be taken either of clerks alone, or of foreigners alone, or of both, for it is only the trial that is to be by a party-jury.

[652] In the case of *Danby* and others, 2 *R. 3. 10.* these points were resolved upon this statute, 1. If the offense be entirely committed in the county where the court of king's bench or common pleas sit, it may be tried, heard and determined by either court without a special commission, for the act of parliament is a commission, 2. If it be committed entirely in a foreign county, or be committed in the county where the court sits, and then the court re-

move

move into another county, it must be heard and determined in the county where the fact was committed, and cannot be indicted, heard or determined in another county than where it was done. 3. That therefore in that case there must be a special commission to the justices of the one court, or to the justices of the other, to hear and determine the offense in that other county, and then they may there take the indictment and try the offender by a party-jury according to the act; but it seems, if the indictment be taken by virtue of such commission, it may be removed into the king's bench by *Certiorari*, if indicted before them, and then tried according to the direction of the act. 4. If the offense were committed in *London*, where, by privilege and charter of the city, the mayor is to be one in commission and of the *quorum*; yet in this case the mayor must not be named in the commission, but only the justices of one of the courts. 5. If the offense be mixt, and partly in *Middlesex*, where the court sits, and partly in *London*, or any other foreign county, the felony is punishable, and so it remains at this day, notwithstanding the statute of 2 & 3 E. cap. 24. 6. But yet in this case the offender committing part of the offense in *Middlesex*, may be indicted of misprision of felony in *Middlesex*, or committing part of the offense in *London*, may be indicted of misprision of felony in *London*, and thereupon fined and imprisoned: and accordingly it was done by the advice of all the judges, and the parties fined, for every felony includes misprision.

And yet observe, 1. The felony was one entire felony committed in two counties, and therefore neither enquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another, and yet the misprision [653] of that felony was inquirable and punishable in either county, where but part of the felony was committed, and yet the jury in that case must take notice of the entire felony, part whereof was committed in another county. 2. Altho the felony itself is by the act limited to special jurisdiction and manner of trial, yet the misprision of that felony was tried by a common jury, and before the general commissioners of *oyer and terminer* in the county where the offense was committed. In this offense the offender hath the benefit of clergy.

11 H. 6. cap. 14. It was made felony for three years to ship merchandizes of the staple in any creeks; but this is expired.

18 H. 6. cap. 15. Exportation of wools, other than to the staple of *Calais* or straits of *Morocco*, felony. *Vide supra, cap. 61. p. 642. & infra.*

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18 H. 6. cap. 19. Soldiers departing from their captain without license, felony. This, together with those other statutes, of the same kind, as 7 H. 7. cap. 1. 3 H. 8. cap. 5. I shall refer to the statute of 2 E. 6. cap. 2. where I shall take the whole matter of soldiers departing into consideration.

28 H. 6. cap. 4. It is felony to take a distres in the counties and royal seignories in *Wales* or dutchy of *Lancaster*, and carry them out of the said counties, dutchy or seignories, &c. saving for the lords of fees distraining. This act was to continue only five years, and then expired.

33 H. 6. cap. 1. If household servants, after the death of their master, violently and riotously take and spoil the goods of their master, and the same distribute among themselves, upon complaint made by the executors, or two of them, to the chancellor, the chancellor with the advice of the chief justices and the chief baron, or two of them, shall direct writs of proclamation to the sheriff for the offenders to appear in the king's bench upon some day certain, fifteen days at least after the proclamation.

[654] And if he appear, he shall be committed to answer the suit of the executors by bill or writ; but if he appear not at the return of the writ, after proclamation so made, he shall be attaint of felony.

This statute extends to one executor, if but one, and to administrators, if no executors, to a lord keeper of the great seal, when no chancellor.

This was a process much in use in case of great offenses, especially about this king's reign, to convict men sometimes in civil offenses, sometimes in cases criminal upon default of appearance at the return of the proclamation. *Vide Stat. 5 H. 4 cap. 6. 11 H. 6. cap. 11.*

But this attainder doth not exclude the offender from clergy. *C. P. C. cap. 43. p. 104.*

12 E. 4. cap. 5. All wools, woolfells, morling and shorling of *Westmoreland*, *Cumberland*, *Northumberland*, and *Durham*, to be shipped out, shall be shipped at *Newcastle upon Tine*, and thence to *Calais* or *Middleborough*, there to be stapled and uttered, and all other wools, woolfells, morling and shorling, to be conveyed only to the staple of *Calais*; if any attempt to the contrary, it shall be felony, saving the king's prerogative to license transportation elsewhere. This act to continue for five years only, and so it expired.

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17 E. 4. cap. 1. If any shall carry or cause to be carried out of this realm or *Wales*, any manner of money of the coin of this realm, or any other realm, plate, vessel, mass bullion, jewels of gold wrought or unwrought, or silver without the king's license, except the persons dispensed with by the statute of 2 H. 6. cap. 6. it shall be felony.

This act was to continue only for seven years.

And by the act of 4 H. 7. cap. 23, it was re-enacted again to continue twenty years; and by the statute of 1 H. 8. cap. 13. it was continued till the next parliament, (f) and then discontinued; but by the act of 7 E. 6. cap. 6. it was revyed for twenty years, and then expired; so that at this day the exportation of gold and silver is not felony, but remains only under the penalty of those statutes that prohibit its exportation under pains of forfeiture; for the act of [655] 17 E. 3. did not make exportation felony. (g) And having this occasion I shall here once for all give an account of the laws in force against the exportation of money and bullion.

By the statute of 9 E. 3. cap. 1. None are to carry any sterlinc out of the realm of *England*, nor silver in plate, nor vessel of gold or silver, upon pain of forfeiture of the same, that he shall so carry, without the king's license; this is confirmed in substance by 38 E. 3. cap. 2. 5 R. 2. cap. 2.

By the statute of 2 H. 4. cap. 5. If any gold or silver be found in the keeping of any upon his passage over sea, in any ship or vessel to go out of any port or creek without the king's license, it shall be forfeit, saving his reasonable expenses.

Merchants strangers to lay out one half of the proceed of their merchandize upon *English* merchandize, and may carry over the other moiety.

By the statute of 4 H. 4. cap. 15. All merchants, and strangers, and others, that sell merchandizes here, shall lay out the money thereby arising in other merchandizes of *England*, to carry the same without carrying any gold or silver in coin, plate or mass out of this realm, upon pain of forfeiting all the same, saving always their reasonable expenses.

This act is still in force, and received a farther confirmation by the statute of 5 H. 4. cap. 9. 9 H. 5. cap. 1.

(f) But not as to the penalty of felony, for that is excepted in the act.

(g) Except in the searcher, if he confederated with any to export in.

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2 H. 6. cap. 6. No gold or silver to be carried out of the realm contrary to the former statutes, except for payment of the king's soldiers, upon pain of forfeiture of the value of the sum so carried, one fourth part to the discoverer, except ransom of prisoners, and money that soldiers carry for their necessary costs, and for horses and sheep bought in Scotland.

3. H. 7. cap. 8. All foreign merchants shall employ their money received in ports, &c. upon merchandize or commodities of this realm, the proof to lie upon the merchant, upon pain of forfeiture of all his goods, and a year's imprisonment. This clause of the Statute of 17 E. 4. made perpetual.

19 H. 7. cap. 5. None to convey any coin, bullion, or [656] plate, above the value of 6s. 8d. out of this realm into Ireland, nor convey such bullion, plate or coin into any ship, boat or other vessel, upon pain of forfeiture thereof, and making fine and ransom at the king's will.

So these several statutes lie in the way of transportation of bullion or coin, tho the act of 17 E. 4. and other acts making it felony are now expired. (h)

C H A P. LXIII.

Concerning the new felonies enacted in the times of R. 3. H. 7. H. 8. E. 6. and Queen Mary.

I Find no new felony enacted in the short reign of R. 3.

By the statute of 1 H. 7. cap. 7. "At every time as information shall be made of any unlawful hunting in any forest, park or warren by night, or with painted faces, to any of the king's council, or to any of the justices of peace in the county where any such hunting shall be had, of any person so suspected thereof, it shall be

(b) By 13 & 14 Car. 2. cap. 31. The melting down the silver money of this realm is prohibited, on pain of forfeiting it, and double the value; and by 15 Car. 2. cap. 7. it is lawful to export foreign coin or bullion, provided an entry be made thereof at the custom-house: but by 6 & 7 W. 3. cap. 17. and 7 & 8 W. 3. cap. 19. before the same be shipt, it is necessary there

should be a certificate from the lord mayor and court of aldermen of London, that oath had been made before them by the owner of the said bullion, and by two or more credible witnesses, that the said bullion, and every part thereof, is foreign bullion, and that no part thereof was the coin of this kingdom, or clippings thereof, or plate wrought within this kingdom.

"lawful

" lawful to any of the same council or justices of peace, to whom
 " such information shall be made, to make a warrant to the [657]
 " sheriff of the county, constable, bailiff, or other officer
 " within the same county, to take and arrest the same person or per-
 " sons, of whom such information shall be made, and to have him or
 " them before the maker of the said warrant, or any other of the
 " king's said council or justices of peace of the said county; and that
 " the said counsellor or justice of peace, before whom such person or
 " persons shall be brought, by his discretion have power to examine
 " him or them so brought of the same hunting, and of the said doers
 " in that behalf; and if the same person wilfully conceals the same
 " hunting, or any person with him defective therein, that then the
 " same concealment be against every person so concealing, felony;
 " the same felony to be inquired of and determined as other felonies
 " within this realm have used to be; and if he *then* confess the truth,
 " and all that he shall be examined of and knoweth in that behalf, that
 " then the said offenses by him done be against the king our sovereign
 " lord but trespass fineable, by reason of the said confession, at the
 " next sessions of the peace to be holden for the same county by the
 " king's justices of the same sessions to be there sessed; and if any ref-
 " couz or disobeyance be made by any person, the which so should
 " be arrested, so that the execution of the same warrant thereby be
 " not had, then the same rescous and disobeyance be felony iniquitable
 " and determinable, as is aforesaid; and if any person be convict of
 " such hunting with painted faces, vizors, or otherwise disguised, to
 " the intent he should not be known, or of any unlawful hunting in
 " the night, then the same person so convict to have such punishment,
 " as he should have, if he were convict of felony. (a)

My lord Coke, *P. C. cap. 21.* hath given us the whole learning of
 this statute, *viz.*

1. The hunting with vizors or painted faces in the day-time, [658]
 and the hunting in the night with or without such vizors, is
 felony; but the party may make it trespass only, if he pleases.
Dy. 50. a.

(a) But now by 9 Geo. 1. cap. 22. (continued by 6 Geo. 2. cap. 37.) it is made felony without benefit of clergy for any person being armed with any offensive weapons, and having their faces blacked or disguised, to appear in any forest, chase, or unlawfully to hunt, kill or steal

any deer, or rob any warren, or steal fish out of any river or pond, or for any person unlawfully to hunt any deer in the king's forests, &c. or maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed.

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2. It doth not extend to the forest, or chase, or park of the king's
(b), nor to forests, parks, or warrens in reputation only, and act
in right.

3. The complaint may be made to any one justice of peace or of
the council, and the warrant may be granted by any one.

4. The warrant must be in writing under seal, and grounded upon
an examination shewing a probable cause of suspicion.

5. When the offender is brought, he must be examined of the
fact done by himself, and then of the fact done by others, but not
upon oath.

6. A hunting without killing is within the penalty.

7. Tho' the hunting be not felony, yet the rescue or disobedience
is felony.

8. But the rescue or disobedience made felony is only that which is
done by the party, not by a stranger.

And altho' the party rescue himself, yet if he be re-taken, so as
execution of the warrant be had, it is no felony.

9. If the party plead not guilty, and is convict of the fact, it is
felony; but if he confess upon his arraignment, it then becomes
only a trespass finable, tho' he denied it upon his first examination.

10. It is held, that if he confess not but conceals upon his ex-
amination before the justice, this alone makes it not felony, neither
can he be indicted upon this statute for such concealment; but it must
be a judicial concealment, namely, if being indicted for the hunting
he upon his arraignment conceals, then he shall be indicted *de novo*
for such concealment; and if convict thereof, he shall be attaint of
[659] felony for concealment, tho' this seems a difficult exposition;

(c) for upon his arraignment for the hunting he only answers
to that indictment, and is not examined touching others; and besides,
if he be indicted for the hunting, if there be evidence to convict him of
the fact, he is convict of felony before the indictment for conceal-

(b) As to this case, a remedy was pro-
vided by 31 H. 8. cap. 12. whereby this
offense, if committed in the king's forests,
&c. is absolutely made felony; but that
statute being repealed by the general clause
of 1 E. 6. cap. 12. a remedy was again pro-
vided by the statute of 9 Geo. 1. above-
mentioned.

(c) This difficulty arises from the afore-
said construction of the act, that it must
intend a judicial concealment, whereas the
act seems plainly to mean a concealment

upon his examination before the justice;
for after the act had given power to the
justice to examine the suspected person, it
immediately adds, *and if the same per-
son wilfully conceals, &c. the said concealment
shall be felony; and if he then confess his
truth, and all that he shall be examined of,
his offense shall be but trespass;* the word
then shews the time of confession to be at
the examination, and therefore the con-
cealment likewise must be intended to be
at that time,

ment comes; and if there be not evidence to convict him of the principal, how shall there be evidence to convict him of the concealment?

11. The concealment that makes a felony, must be a wilful concealment.

By the statute of 3 H. 7. cap. 2. It is enacted, "That whereas: " women, as well maidens, as widows and wives having substance, " some in moveable goods, some in lands and tenements, and some " being heirs apparent to their ancestors, had been often taken by " misdoers contrary to their wills, and after married to such misdoers, " or to others by their assent, or defiled to the great displeasure of " God, contrary to the king's laws, and disparagement of the said " women, and utter heaviness and discomfort of their friends, and to " evil example of others, it is therefore ordained, established and " enacted by our sovereign lord the king, by the advice of the lords " spiritual and temporal, and commons in the said parliament assent- " bled, and by authority of the same, That what person or persons " from henceforth taketh any woman *so* against her will unlawfully, " that is to say, maid, widow, or wife, that *such* taking, procuring, " abetting to the same, and also receiving wittingly the same woman " *so* taken against her will, and knowing the same, be felony; and " that such misdoers, takers, and procurators to the same, and re- " ceivers, knowing the same offense in form aforesaid, be henceforth " reputed and judged as principal felons. Provided that this act extend " not to any person taking any woman, only claiming her [660] " as his ward or bond-woman.

For the making of a felony within this statute, there must be these circumstances on the part of the woman: 1. That the maid, wife, or widow, have substance of goods or land, or be heir apparent. 2. That she be taken away against her will. 3. That she be married to, or defiled by the misdoer, or some others by his consent. Without these three concurring, it makes no felony within this statute, 3 & 4 P. & M. *Dallison* 22. 4: That she be not in ward, or a bond-woman to the person that taketh her, or causeth her to be taken only as his ward or bond-woman. *Co. P. C. cap. 12. p. 61.*

In *Fulwood's case*, *M. 13. Car. 1. B. R. Cro. p. 482. 484. 485. 492.* these points were resolved: 1. That if a woman be taken away forceably in the county of *Middlesex*, and married in the county of *Surrey*, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking, make not felony.

2. But

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2. But if she were taken in the county of *Middlesex*, and carried into the county of *Surrey*, so that it is a continuing force in *Surrey*, tho begun in *Middlesex*, and then she is married in *Surrey*, there the offender may be indicted upon this statute in *Surrey*. 3. Tho possibly the marriage or the defilement might be by her consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking away were against her will (*d*). 4. That if as well the marriage as the taking away were against her will, so that the marriage was voidable, yet it is a marriage *de facto*, and therefore being taken away against her will, and also married against her will, it is felony within this statute. 5. That it is not necessary in the indictment to say, that she was taken *ex intentione* to marry or defile her, because the statute hath no such words of *ex intentione*. But farther, he marrying her the same day he took her, it must needs appear, that it was *ex intentione*; yet these words, *ex intentione ad ipsam maritandam*, are usually added in indictments upon this statute, and it is safest so to [661] do. 6. That the woman thus taken away and married may be sworn and give evidence against the offender, who so took and married her, tho she be his wife *de facto*.

And all these points were accordingly resolved, *H. 24 & 25 Car. 2.* in *Brown's case* (*e*), upon this statute, only the indictment ran, *ex intentione ad ipsam maritandam*: the offender was convict and executed: and the reasons why the woman was sworn and gave evidence in the case of *Brown* were, 1. Because the taking away of the woman and marrying were the same day, and she was rescued out of their hands, and the offender taken the next day, and so all done *flagrante criminis*. 2. It was but a forced marriage, and so no marriage *de jure*. 3. There was no cohabitation. 4. Concurring evidence to prove the whole fact. But had she freely without constraint lived with him that thus married her, any considerable time, her examination in evidence might be more questionable.

By the statute of 39 *Eliz. cap. 9.* Clergy is taken away from the principals, procurers, and accessaries before the offense committed.

By this act of 3 *H. 7.* the procurers, as well as the misdoers themselves, and any person that receives the woman thus taken away, are principals by this statute, and so ousted of clergy; but he that receives the offender knowingly, is only accessary *after*, and not excluded from clergy.

(*d*) And so it was resolved in *Swafford's case*, *M. 1 Ann. State Tr. Vol. V. p. 468.* in which case most of the other points here mentioned were likewise ruled.

(*e*) 3 *Keb. 193. 1 Feb. 243.*

Quæ-

Quare, Whether tho the receiver of the woman be made principal by the act of 3 H. 7. he were intended to be ousted of clergy by 39 Eliz. cap. 9.

The statute of 3 H. 7. cap. 14. recites, " That forasmuch as by
 " quatrels made to such as have been in great authority, office, and
 " of council with the kings of this realm, hath ensued the destruc-
 " tion of the kings and undoing of this realm, so as it hath appeared
 " evidently, when compassing of the death of such as were the
 " king's true subjects was had, the destruction of the prince was
 " imagined thereby, and for the most part it hath grown by the
 " malice of the king's own household servants, as now of late such
 " a thing was like to have ensued; and forasmuch as by [662]
 " the law of this land, if actual deeds be not had, there is
 " no remedy for such false compassings, imaginations, and con-
 " federacies had against any lord, or any of the king's council, or
 " any of the king's great officers in his household, as steward, trea-
 " surer, comptroller, and so great inconveniences might ensue, if
 " such ungodly demeaning should not be straitly punished before
 " that actual deed were done; therefore it is ordained by the king,
 " and the lords spiritual and temporal, and the commons of the said
 " parliament assembled, and by authority of the same, that from
 " henceforth the steward, treasurer, and comptroller of the king's
 " house for the time being, or one of them, shall have full power
 " and authority to inquire by twelve sad men and discreet persons of
 " the exchequer roll of the king's household, if any person admitted
 " to be his servant, sworn, and his name put into the chequer roll
 " of his household, whatsoever he be, serving in any manner, office
 " or room, reputed, had or taken, under the state or degree of a lord,
 " make any conspiracies, compassing, confederacies or imaginations
 " with any person or persons to destroy or murder the king, or any
 " lord of this realm, or any other person sworn to the king's council,
 " steward, treasurer, or comptroller of the king's house, that if it be
 " found before the said steward for the time being by the said
 " twelve sad men, that any such of the king's servants as is above-
 " said, hath confederated, compassed, conspired, or imagined, as is
 " above said, that he so found by that inquiry be put thereupon to
 " answer, and the steward, treasurer, and comptroller, or two of
 " them, have power to determine the same matter according to the
 " law; and if he put him in trial, that then it be tried by other
 " twelve

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" twelve sad men of the same houſtold ; and that ſuch miſdoers have
" no challenge but for malice. And if ſuch miſdoers be found guilty
" by confeſſion or otherwife, that the ſaid offeſe be judged felony,
" and they to have judgment and execution as felons attaint ought
" to have by the common law.

Vide the obſeruations of my lord Coke upon this aꝝt, Co.
[663] P. C. cap. 4. where on the part of the offender there muſt
be theſe quaſifications, viz. 1. He muſt be the king's ſworn ſer-
vant. 2. His name muſt be in the chequer roll. 3. He muſt be
under the degrēe of a lord. 4. Tho his conſpiring with another
not of the houſtold be an offeſe, yet he only of the houſtold is
the felon.

On the part of the perſon againſt whom the conſpiracy is, are
theſe requiſites: 1. The conſpiracy to muſter the king; or 2. A
lord of the realm; but yet only ſuch as is ſworn of the king's privy
council. 3. Any other of the king's privy council, tho under the de-
gree of a lord. 4. The ſteward, treasurer, or comptrolier of the king's
houſe, tho neither a lord nor of the privy council.

The power to hear and determine. 1. The ſteward, treasurer,
and comptrolier, [or any two of them, haue power to determine,*]
tho the aꝝt faith, they or any one of them may inquire. 2. If a ſer-
vant of the king's houſe, *ut ſupra*, conſpire the death of the ſteward,
treasurer, and comptrolier, yet they remain the only judges in this
cauſe by this aꝝt, tho they may take others to their affiſtance, yet
none but they ſit as judges. 3. The preſentment and trial muſt be
only by the ſervants of the houſtold. 4. The inquiry may be by
twelve or more, but the trial only by twelve. 5. No challenge but
for malice. 6. The conſpiracy muſt be plotted in the king's houſe.
7. The offender is to have his clergy.

And note, this being a new made felony, and the manner of its
determination particularly limited, it is not determinable before any
other judges, or in any other courts, neither in the king's bench, oyer
and terminer, or gaol delivery. Quere, whether their ſeffion muſt
not be in the king's houſe.

By the ſtatute of 7 H. 7. cap. 1. There is provision of felony againſt
captains and ſoldiers leaving their ſervice; but this I ſhall take up

* The words here in the MS. are, *Or any one or any two of them haue power to inquire, but they ſeem plainly to haue been* so written by miſtake, the ſeafe requiring them to be as above.

here.

hereafter, as also the statute of 3 H. 8. cap. 5. which I shall refer to 4 & 5 P. & M. cap. 3.

I come to the time of H. 8. which was fruitful in enacting new treasons and new felonies, and new offenses as [664] to *Præmunire*.

But there were two acts of parliament, that repeal all new treasons and misprisions of treasons, so all new felonies enacted at any time after the first day of the reign of *Henry 8. viz.*

1 E. 6. cap. 12. Whereby it is enacted, " That all offenses made " felony by any act or acts of parliament made since the 23d day of " April, in the first year of the reign of king H. 8. not being felony " before, and also all and every the branches and articles mentiond, " or in any ways declared in any of the said statutes concerning the " making of any offense or offenses to be felony, not being felony " before ; and all pains and forfeitures concerning the same, or any " of them, shall from henceforth be repeal'd, and utterly void and of " none effect.

1 Mar. cap. 1. Whereby it is enacted, " That all offenses made " felony, or limited to be within the case of *Præmunire*, by any act " or acts of parliament, statute or statutes made since the first day " of the first year of the reign of king *Henry 8.* not being felony " before, ~~not~~ within the case of *Præmunire*, and all and every branch, " article and clause mentiond, or in any ways declared in any of the " said statutes concerning the making of any offense or offenses to " be felony, or within the case of *Præmunire* before, and all pains " and forfeitures concerning the same, or any of them, shall from " henceforth be repeal'd and utterly void, and of none effect.

The former of these statutes, and also the latter repeal all new felonies enacted in the time of *H. 8.* who began his reign *April 22. 1509.* and the latter of these statutes repeal also the new created felonies in the reign of *E. 6.*

But neither of these statutes did extend to piracy or robbery upon the sea, nor any such act as concerned matter of proceedings touching felonies, that were such before the time of *H. 8.* and therefore those statutes in the time of *H. 8.* that concerned clergy, sanctuary, peremptory challenge, place or manner of trial of felons, or the erecting of new jurisdictions for their trial, as that of [665] 33 H. 8. cap. 12. for felonies in the king's court; for these acts were

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not constitutive of new felonies, but only directions of the course of proceedings in cases of old felonies.

Those statutes that made new felonies both in the time of *H. 8.* and *E. 6.* are therefore of these kinds, *viz.*

1. Such as were enacted *de novo* in the times of *H. 8.* and *E. 6.* and were never after revived or re-enacted by any subsequent act of parliament; such were those of 31 *H. 8. cap. 2.* of breaking the heads of ponds, and taking fish, 31 *H. 8. cap. 12.* and 32 *H. 8. cap. 11.* stealing of hawks eggs, and hunting in the king's forests, &c. 33 *H. 8. cap. 8.* of witchcraft. 33 *H. 8. cap. 14.* of prophecies. 37 *H. 8. cap. 6.* The burning of a frame of timber. 37 *H. 8. cap. 10.* Libellous papers charging men to have spoken treason. 23 *H. 8. cap. 11.* Breaking prison.

2. Such as were repealed but enacted again in the same kind, but with some alterations, as 22 *H. 8. cap. 10.* concerning *Egyptians*, altered by 1 & 2 *P. & M. cap. 4.* and by 5 *Eliz. cap. 20.*

3. Such as were *de novo* enacted to be felonies in the times of *H. 8.* and *E. 6.* and repealed, but re-enacted again, as 22 *H. 8. cap. 11.* touching cutting of *Powdike*, renewed by 2 & 3 *P. & M. cap. 19.* 3 *H. 8. cap. 5.* concerning soldiers, re-enacted in a great measure by 2 *E. 6. cap. 2.* and 4 & 5 *P. & M. cap. 3.* 21 *H. 8. cap. 7.* servants embezzling their masters goods, by 5 *Eliz. cap. 10.* 25 *H. 8. cap. 6.* concerning buggery, by 5 *Eliz. cap. 17.* 23 *H. 8. cap. 16.* concerning *Scotchmen*, re-enacted by 1 *Eliz. cap. 7.* but finally repealed by 4 *Jac. 1. cap. 1.*

4. Some offenses were made felony by former acts of parliament before *H. 8.* but had additions to them, extending the felonies farther than the old acts, some such thing may be found in the statute of 3 *H. 8. cap. 5.* concerning soldiers in relation to the statute of 7 *H. 7. cap. 1.* and then the old felonies stand, but the additional felonies are repealed.

[666] Concerning the first of these ranks of acts, I shall say nothing, because they are now utterly void; but concerning the other three ranks of statutes, I shall proceed according to their order of time.

First, For the statute of 3 *H. 8. cap. 5.* as also that of 2 *E. 6. cap. 2.* concerning soldiers, I shall refer them to the statute of 4 & 5 *P. & M. cap. 18.*

By

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By the statute of 21 H. 8. cap. 7. It is enacted, " That all and singular servants, to whom any caskets, jewels, money, goods or chattels, by his or their masters or mistresses, shall from henceforth be delivered to keep, that if any such servant or servants withdraw themselves from their masters or mistresses, and go away with the said caskets, jewels, money, goods or chattels, or any part thereof, to the intent to steal the same, and defraud his or their masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their masters or mistresses, or else being in the service of his or their master or mistress without any assent or commandment of his master or mistress, embezzle the same caskets, jewels, money, goods or chattels, or any part thereof, or otherwise convert the same to his own use with like purpose to steal it, that if the said casket, jewels, money, goods or chattels, that any such servant shall go away with, or which he shall embezzle with purpose to steal as aforesaid, be of the value of forty shillings, or above, that then the same false, fraudulent, or untrue act and demeanor shall from henceforth be deemed and adjudged felony, &c. Provided it extends not to apprentices, nor to any person under the age of eighteen years; but every such apprentice or person within that age doing that act shall be and stand in the like case as they were before the making of this act. This act to endure till the next parliament.

By the act of 27 H. 8. cap. 17. Clergy was taken away in this case, if the indictment were laid specially upon the act of 21 H. 8. and pursuant to the same; and by the act of 28 H. 8. cap. 2. this act of 21 H. 8. was made perpetual; but by the act of 1 E. 6. cap. 12 these acts were both repealed.

But again, by the act of 5 Eliz. cap. 10. this act of 21 [667] H. 8. was re-enacted and revived, yet it did not revive the act of 27 H. 8. cap. 17. for taking away clergy. 1. Because the words of the reviving act of 5 Eliz. revive only the act of 21 H. 8. specially and particularly by name, and not any other incident act concerning clergy. And again, 2. Because the acts taking away clergy were specially repealed by the statute of 1 E. 6. cap. 12. except in those cases there particularly enumerated, so that at this day a party indicted and convicted upon this statute hath his clergy. (f)

(f) But by 12 Ann. cap. 7. Clergy is in practice under the age of fifteen years, such case taken away from facts committed robbing their masters.

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And note, that in this case, and all other cases of this nature where a statute is repealed and re-enacted, an indictment or information may conclude either *contra formam statutorum*, or *contra formam statuti*, for it shall be intended the last statute. And so it is, if a statute be but temporary and then expires, and then is re-enacted; but if a statute be continued till the end of the next session of parliament, and before that next session be ended it is continued over, the indictment may run *contra formam* of the first statute, for it never was interrupted, or it may conclude *contra formam statutorum*. *P. 42 Eliz. B. R. Dingly and Moore, (g) M. 31 & 32 Eliz. B. R. Mill's case.*

This statute was introductory of a new law, when the goods were actually delivered to the servant that goes away with them; for where there is such a delivery it could not at common law be a felony.

But yet a servant might be guilty of felony at common law, if he takes the goods of his master feloniously, nay, tho they be goods under their charge, as a shepherd, butler, &c. *vide supra, cap. 43. p. 505.* and for this he may be indicted at this day as a felony at common law, and of this felony at common law, an apprentice or servant under the age of eighteen years may be guilty, and indicted thereof at common law.

And therefore tho the statute of 21 H. 8. exempt an apprentice or [668] servant under the age of eighteen years from the pain of felony enacted *de novo* by this statute, namely, where goods are actually delivered to him, yet it leaves him in the same condition as to any felony at common law, as if he were not excepted; and therefore if my butler or shepherd, under the age of eighteen years, or if my apprentice takes away my goods feloniously without my actual delivery. tho they are under the value of forty shillings, he is indictable of felony at common law.

If I deliver my servant a bond to receive money, or deliver him goods to sell, and he receives the money upon the bond or goods, and goes away with it, this is not felony at common law because the money is delivered to him, nor felony by this statute, because tho the bond or goods were delivered him by the master, yet the money was not so delivered by the master. *Dy. 5. a. Co. P. C. cap. 44.* And yet by the very payment of the money to the servant to the master's use, the master is by law said to be actually possessed of this money; and if taken away from the servant by a trespasser or robber, the master

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may have a general action of trespass, or action upon the Statute of hue and cry.

But it is held, that if the master delivers to the servant twenty pounds in silver to change it into gold at the goldsmith's or leather to make shoes, and he run away with the gold or shooes, it is felony.

Crompt. Justic. 35. b.

If *A.* hath two servants, *B.* and *C.* *B.* by the command of *A.* the master, and in his presence delivers the master's goods to *C.* by the master's command, and *C.* runs away with it, this is felony within the statute, for it is the master's delivery; but suppose it be delivered by the master's command, but in the master's absence, *quare*, whether this be within the statute, and what difference there is between this case and the receiving money from a creditor by the master's directions? yet *vide Dy.* 5. it seems felony.

If the master's wife delivers goods of the master to the servant to keep, and he goes away with it, it seems this is within the statute, for he hath them by delivery of his mistress, and the master's wife is as well his mistress, as if she were sole, *vide* Statute 25 E. 3. for petit treason.

By the Statute of 22 H. 8. cap. 11. Every perverse and [669] malicious cutting down of the new *Powdike of Marſſland*, or of the old *Powdike* of the Isle of *Ely*, or of any part thereof, or of any other bank, being part of the rind and uttermost part of the country of *Marſſland*, made for the defense thereof, other than working upon the same for repairing or amending the fortifying thereof, is enacted to be felony.

This act was repealed by 1 E. 6. cap. 12. and 1 Mar. cap. 1. but is revived by 2 & 3 P. & M. cap. 19. and so continues.

But the offender hath the benefit of clergy.

By the Statute of 23 H. 8. cap. 16. The selling of a horse to a Scotchman, or delivering a horse in *Scotland* is made felony.

This was repealed by 1 E. 6. cap. 12. and tho made penal by the act of 1 E. 6. cap. 5. yet never revived, (*b*) and the acts of this kind are repealed by 4 Jac. 1. cap. 1. as to *Scotland*.

By the act of 25 H. 8. cap. 6. buggery with mankind or beast is enacted to be felony, and the felon excluded from clergy.

(*b*) This must be some mistake in the MS. *Elix. cap. 7.* tho afterwards repeal'd by § for this Statute was revived, as our author *Jac. 1 cap.* himself says a little above, p. 665. by *i*

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This statute was repealed by the general act of 1 E. 6. cap. 12. and in 2 E. 6. cap. 29. it was enacted to be felony without clergy, but without loss of lands or goods, or corruption of blood.

But this act of 2 E. 6. was repealed by the statute of 1 Mar. cap. 1. and so both acts stood repealed until 5 Eliz.

But by the statute of 5 Eliz. cap. 17. the entire act of 25 H. 8. cap. 6. is revived and re-enacted, so that this offense stands at this day absolutely felony without benefit of clergy.

To make buggery there must be *penetratio*, as in case of rape. *Vide supra*, p. 628.

A woman may be guilty of buggery with a beast within this statute.

[670] If buggery be committed upon a man of the age of discretion, both are felons within this law.

But if with a man under the age of discretion, *viz.* fourteen years old, then the buggerer only is the felon.

Those that are present, aiding and abetting, are all principals; the statute making it felony generally; there are or may be accessories before and after, as in case of rape. But tho' none of the principals are admitted to their clergy, yet accessories before and after are not excluded from clergy.

Touching the time of E 6. I do not find any new felony enacted, but that of 2 & 3 E. 6. cap. 6. which I shall hereafter consider, when I come to 4 & 5 P. & M. cap. 3.

In the time of queen Mary we find these statutes following making new felonies.

By the statute of 1 & 2 P. & M. cap. 4. "If any outlandish people calling themselves or being called *Egyptians*, shall remain in this realm or Wales one month at one or several times. And if any person being fourteen years old, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him or herself like them, shall remain here or in Wales one month either at one or several times, it is felony. (i)

The trial to be by the inhabitants of the county, where they

(i) Our author has here copied from Co. P. C. cap. 39. where the two statutes of 1 & 2 P. & M. and 5 Eliz. cap. 20. are blended together; for this last clause and the words *at one or several times* in the first clause belong to 5 Eliz. and not to 1 & 2 P. & M.

are taken, and not *per medietatem linguae*, no sanctuary or clergy to be allowed.

A proviso; that it extend not to their children under thirteen years old.

And by the statute of 5 *Eliz. cap. 20.* the act of 1 & 2 *P. & M.* is confirmed and extended to all above the age of fourteen years, that shall be found in the company of vagabonds, commonly called or calling themselves *Egyptians*, or counterfeiting or disguising themselves by their apparel, speech or behaviour like them, if they continue one month, altho they are persons born in the king's dominions. Clergy is ousted.

I have not known these statutes much put in execution, [671] only about twenty years since at the assizes at *Bury* about thirteen were condemned and executed for this offense.

I am now come to that, which I have all along promised, namely, the felony of soldiers running from their captains, enacted by several statutes, as namely, 18 *H. 6. cap. 19.* 7 *H. 7. cap. 1.* 3 *H. 8. cap. 5.* 2 & 3 *E. 6. cap. 2.* repeal'd by 1 *Mar. cap. 1.* and revived by 4 & 5 *P. & M. cap. 5.* and the Statute of 5 *Eliz. cap. 5.*

I shall take up the whole matter together, beginning with the anterior statutes, and so descending downwards to the latter.

By the Statute of 18 *H. 6. cap. 18.* It is recited, " That divers captains, that were retained by indenture to serve the king, some beyond the seas and some in the marches, had defrauded the soldiers under their retinue of their pay ; and enacts, that no captain, which shall have the conduct of such retinue, and shall receive the king's wages for the same, shall abate his soldiers their wages, except it be for their cloathing, that is to say, if they shall be waged for half a year, ten shillings a gown for a gentleman, six shillings and eight pence for a yeoman, upon pain to forfeit twenty pounds for a spear, ten pounds for a bow to the king, for whom he did abate."

And by the Statute of 18 *H. 6. cap. 19.* It is recited and enacted, as followeth, " Whereas many soldiers, which have taken pacl of their wages of their captains, and so have muster'd and been entred of record the king's soldiers before his commissioners for such terms for which their masters have indented, have sometimes, presently after their muster and receiving part or all of their wages, departed and gone where they will, and have not passed the sea with their captains, and some passed the sea, and long within their terms de-

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" parted from their captains and the king's service, without apparent
" license to them granted by their captains, to the great damage, &c.
" it is enacted, that every man so (*k*) mustering and receiving the
[672] " king's wages, which departeth from his captain within his
" term in any manner aforesaid, (except notorious sickness
" by the visitation of God suffers him not to go, and which he shall
" certify presently to his captain, and repay his money, so that he
" may provide him for another soldier in his place) he shall be pu-
" nished as a felon, and the justices of the peace shall have power to
" hear and determine the same; and that no soldier, man of arms or
" archer so mustered of record, and going with his captain beyond
" the sea shall return into *England* within the term for which his cap-
" tain hath retained him, nor leave his captain there in the king's ser-
" vice, and in adventure of the war, except he hath reasonable cause
" by him shewed to his captain, and by him to the chief in the coun-
" try having royal power, and thereupon shall have a license of the
" said captain witnessed under his seal, and shewing the cause of his
" license; and if any that doth muster of record come without letters
" testimonial of his captain within his term on this side the sea, the
" mayors, &c. shall arrest them, and detain them until it be inquired
" of, and if it be found by inquiry before the justice of peace, and
" proved, that they have mustered of record and departed from their
" captains without license, as aforesaid, they shall be punished as
" felons." But it took not away clergy.

By this act it appears, that the method of those times was, that as well the soldiers as the captains were under a contract to serve in the war, some for longer time, some for shorter, and sometimes the subordinate soldiers contracted with the king, but most commonly the captain contracted with the king to serve him with such a number of men raised by himself for such a time, as half a year or the like, and the captain made his contract with his soldiers (therefore called his retinues), and the captain received the pay for himself and them.

And this method continued until 7 H. 7. and for a long time after, as appears by the whole preamble and body of the statute of 7 H. 7. cap. 1,

[673] By that statute it is enacted, " That every captain and

(*k*) This word [so] restrains the statute to soldiers retain'd in the manner mentioned in the 28, which method of retainer

being now disused, this statute is consequently become of little force.

" soldiers

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" soldiers at the king's wages shall, under pains in the same act
" limited, pay to their retinue of soldiers their wages rateably, as
" it is allowed by the king or the treasurer of his wars, and that
" within six days next after they have received it ; and if any soldier,
" being no captain, immediately retained with the king, which here-
" after shall be in wages and retained, or takes any *prest* to serve the
" king upon the sea or upon the land beyond the sea, departs out of
" the king's service without license of his captain, that such departing
" be felony without the privilege of clergy ; and the justices in every
" shire, where such offender is taken, shall hear and determine the
" offense, as if done in the same county ; and their departure and re-
" tainer, if traversed, shall be tried in the same county where taken."

But this act extended not to soldiers impressed to serve in *England*.

By this statute it appears, that the retainer of the captain was by contract with the king, and he by the same contract was to provide the soldiers, which were to be at the king's pay. This is continued also till 3 H. 8. as appears by the preamble and body of the act of 3 H. 8. cap. 5.

By that act of 3 H. 8 cap. 5. The same punishment is enacted upon soldiers departing without license, only here it is without license of the king's lieutenant.

By the statute of 7 H. 7. It is receiving wages or *prest* to serve the king upon or beyond the sea; here it is to serve the king upon the sea, or upon the land, or beyond the sea, which is larger than 7 H. 7. for it extends to land service, and the punishment is limited to the justices of the peace of the counties where taken.

Proviso, that it extend not to captains or soldiers retained to serve in *Calais*, &c. *Berwick* or *Wales*.

It is resolved 6 Co. Rep. 27. a. in the case of soldiers, that both these statutes have continuance, and the word (*king*) extends to the successors of those kings (*m*), and altho by the statute of 1 E. 6. and 1 Mar. all new felonies made since the first day of [674] the reign of H. 8. that were not felonies before, are repealed, yet inasmuch as the statute of 3 H. 8. enacts no new felony, but what was felony by 7 H. 7. cap. 1. tho it vary as to the person, that is to grant the license, and the persons that are to try it, (*) yet it was in

{m) Vide ante, pag. 1001
(*), The persons empower'd to try it are

the same by both statutes.

truth

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truth no new felony, and therefore it is held the statute of 3 H. 8. was not repealed by 1 Mar. or 1 E. 6.

But it seems to me to be repealed by 1 E. 6. and 1 Mar. for to depart without license of the captain, and to depart without license of the king's lieutenant, are several offenses, for suppose he had the Lieutenant's license and not the captain's, it is not excuse enough within 7 H. 7. and if he had the captain's license and not the lieutenant's, it excuseth not within the statute of 3 H. 8. But then *quare*, whether the exception for clergy of men in orders, or of soldiers in *Catais, Berwick, and Wales*, extends to the statute of 7 H. 7. cap. 1.

If this variance by the statute of 3 H. 8. be a repeal of the statute of 7 H. 7. then they are both repealed, that of 7 H. 7. by 3 H. 8. and that of 3 H. 8. by 1 E. 6. and 1 Mar.

The statute of 2 & 3 E. 6. cap. 2. recites, "That whereas divers of the king's subjects, according to their bounden duties, have appointed and sent into the parts beyond the seas and into *Scotland* many able persons and soldiers with horses and harness meet to serve the king in his wars to their great charges and costs, yet some of the soldiers so sent have, contrary to their bounden duty, sold or converted the said horses and harness, whereby the king hath been destitute of their service, and the owners who sent them have been deceived of their horses and harness, and less able to refurnish other like soldiers with horses and harness at such time as they shall be commanded by the King."

It is enacted, "That if any soldier hereafter serving the king in his wars in any of his dominions, or on the seas, or beyond the seas, shall hereafter purloin, &c. Such horses or arms, he shall be committed by the lieutenant, &c. upon due proof or testimony [675] till satisfaction, &c. And if any soldiers serving, as is aforesaid, depart without license of his lieutenant or other abovenamed with booty or otherwise, being in the enemies country, or elsewhere in the king's service, or out of any garrison, where he or they be appointed to serve, that then every such soldier so departing without license, shall be taken and judged as a felon without benefit of clergy or sanctuary; and the justices of every shire, where he is taken, shall have power to hear and determine the offense, as if committed in the same county.

"Provisions against captains short pay, &c. Provided not to extend to detaining of wages for victuals, harness, weapons, or for any profit money provided and delivered to such soldier."

Note,

Nota. This act, tho it vary from the preamble of the other acts of 7 H. 7 and 3 H. 8. and recites, that the king's subjects according to their *bounden duty* had sent men and soldiers, doth not necessarily infer a compulsive power upon the persons so to send, or so to go; 1. Unless they were bound by tenure to attend in person or send; such were tenants by knights service (*n*). 2. Unless obliged by the statute of 11 H. 7. cap. 18. or 19 H. 7. cap. 1. as having offices, pensions, or lands given by the king, who by these statutes were bound to follow the king in his wars, but at the king's wages, by those statutes which were held perpetual. 3. Or unless they had contracted with the king to find him soldiers, for this course was not wholly out of use, and the preamble seems to import as much, for they sent their soldiers, and when they thus departed with their arms were bound to refurbish others.

And tho there be mention of *prest* money in this act; yet in truth it was *imprest* money, or the earnest of the contract between the king by the captain and the soldiers, and not as is now used.

But yet upon this act two things are observable. 1. That this act did not make the departure of any soldier to be felony, unless he were actually in the king's service in his wars. 6 Co. [676] Rep. 27. a. case of soldiers.

2. Tho this felony was in substance the same, that was enacted by 7 H. 7. yet the general clause of the act of 1 Mar. cap. 1. repealed it.

And this is accordingly so recited by the statute of 4 & 5 P. & M. cap. 3. which doth recite it to be repealed, and therefore by an express enacting clause renews that clause of the statute of 2 & 3 E. 6. that makes such departure felony.

By the statute of 5 Eliz. cap. 5. It is recited, "That it hath been doubted, whether the statute of 18 H. 6. cap. 19. did or ought to extend to mariners and gunners serving on the seas taking wages of the king or queen. It is expressed, ordained, and enacted and declared, that the said statute in all pains, forfeitures and other things did and doth, and hereafter shall extend as well to all and every mariner and gunner having taken, or that shall hereafter take prest or wages to serve the queen, her heirs or successors, to all intents and purposes, as the same did or doth to any soldier; any diversity of opinion, doubt, or matter to the contrary notwithstanding." But this takes not away the benefit of clergy.

¹ See Co. Lit. p. 76. a. §. 102.

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In *Co. Rep.* 27. a. The case of soldiers. The case was, that divers soldiers after they were prest, and going towards *Ireland* to serve against the rebels there, and before they had served in the war, did depart and *esloigne* themselves; hereupon it was resolved by all the judges of *England*, 43 *Eliz.* upon a reference to them made, as it seems, 1. That this case was not within the statute of 18 *H. 6.* but that act is now of little use, because that act refers to the antient manner of retaining soldiers, which was usual between the king and great men, to serve the king with such a number of men for a certain time. 2. That the statute of 2 & 3 *E. 6. cap. 2.* revived by 4 & 5 *P. & M.* extended not to this case, for that statute extended to the departure of a soldier after he had been in actual service in the war. 3. That the statutes of 7 *H. 7. cap. 1.* and 3 *H. 8. cap. 5.* which in substance are both of one effect, are perpetual laws, [677] and the word *king* extends to his successors, and upon those two acts divers soldiers were attaint and executed.

The reason thereof cannot be grounded upon any supposition, that the course of military retainers was altered in 7 *H. 7.* from what it was in the time of *H. 6.* for there are very many indentures of retainers of record according to the antient form long after that time, and indeed the statutes of 7 *H. 7.* and 3 *H. 8.* do import as much, as will easily appear to an attentive reader of them: But that which seems to extend the acts of 7 *H. 7.* and 3 *H. 8.* to this case, are the words *or take any prest, to serve the king*; which words are in these statutes and in that of 5 *Eliz. cap. 5.* which are wanting both in the statute of 18 *H. 6. cap. 19.* and 2 & 3 *E. 6. cap. 2.* for that makes them subject to the penalty for departing without license, as well as if they had received wages, or had been mustered, or been in actual service in the wars.

All the difficulty rests in the word *prest*, *vix.* whether it be to be intended passively from *premo presti*, as it is commonly used at this day, and is so express in the case of soldiers, *Apres ces quilz fueront prest:* Or whether to be taken actively, as it is express in the statutes of 7 *H. 7.* 3 *H. 8.* and 5 *Eliz.* *having taking prest to serve, &c. prestitum, or the earnest of their contract (o).*

All

(o) Whatever doubts may formerly have been about the meaning of the word *prest*, yet it seems now to be fixt to the latter sense by 5 & 6 *W. & M. cap. 15.* for it is there enacted, "That no person, that shall be listed for the land service, should for the future be excepted a bated sentence by dier, or be subject to the penalties of this

All do agree, that if a man do voluntarily receive or take *prest* to serve as a soldier, mariner, or gunner, either upon or beyond the seas, he is bound thereby, and if he depart without license, it is felony within the statute of 7 H. 7. cap. 1. 3 H. 8. cap. 5. [678] and 5 Eliz. cap. 5. for the words of the statutes are express in it; only in the case of a soldier it is without benefit of clergy, but of a mariner or gunner it is within benefit of clergy, because the statute of 18 H. 6. cap. 19. doth not exclude clergy, and the statute of 5 Eliz. extends only the statute of 18 H. 6. to mariners and gunners, and mentions nothing of the statute of 7 H. 7. or 3 H. 8. which exclude clergy. But of the business of clergy hereafter in this chapter.

But on the other side, the compulsion of men to go beyond or upon the sea, or otherwise of imprisoning of them, or compelling men to take *prest* money, or otherwise to imprison them hath been, I confess, a practice long in use; how far it is justifiable or not the books that have treated of it are to be consulted. *Vide* the argument of *Calvin's case*, 7 Co. Rep. 7. b. He that reads the comment of my lord Coke upon *Confirmatio Cartar*, cap. 5. and his observations and conclusions there upon the statutes of 1 E. 3. cap. 5 & 7. (p), 18 E. 3. cap. 7. (q). 25 E. 3. cap. 8. (r), 4 H. 4. cap. 13. (s), may reasonably think he varied his opinion (t). And he, that looks upon the acts enabling

" this act, or any other penalty for his behaviour as a soldier, unless before his being listed or inserted in any muster-roll he shall have been brought before a justice of peace, (not being an officer in the army) or chief magistrate of some city, or high constable of the hundred or division where the party shall be listed, and before such justice, &c. shall declare his free consent to be listed as a soldier." Altho the former clause of this statute for reviving the punishment of mutiny or desertion be limited to the time mentioned in the act, yet this clause coming after that limitation, and being general not only in relation to the penalties of this act, but of any other act, seems to be perpetual.

(p) This statute provides, that no man shall be charged to arm himself otherwise than was formerly wont, and that no man be compelled to go out of his shire, but where necessity requireth, and sudden coming of strange enemies into the realm.

(q) This statute ordains, that men of arms, &c. chosen to go in the king's service out of England shall be at the king's

wages, till their coming again.

(r) This statute enacts, that no man shall be constraint to find men of arms, other than those who hold by such service, except it be by common assent in parliament.

(s) The design of this statute is chiefly to confirm the three acts above mentioned.

(t) In *Calvin's case* he was of opinion, that the subject is bound to serve the king in his wars both within and without the realm; and in his comment upon *confirmatio cartar*. cap. q. 2 *Instit.* 528. he says, that the statutes above mentioned, (which provide, that none shall be compelled to go to the king's war out of his shire, except in case of necessity, nor shall be constraint to find men of arms, except by consent of parliament,) were but declarations of the ancient law of England. And again, in his comment on *Magna Charta*, cap. 29. 2 *Instit.* 47. he says, that the king cannot send any subject against his will to serve him out of the realm, nor even into Ireland, for then under pretense of service he might send him into banishment.

pressing

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pressing of soldiers and mariners for foreign service upon or beyond the sea, namely 17 Car. 1. cap. 12. cap. 25. cap. 26. may think that those times made some doubt of it (*u*). But of this matter [679] I deliver no opinion (*x*). Howsoever, to make a felony within those acts of 7 H. 7. cap. 1. 3 H. 8. cap. 5. 5 Eliz. cap. 5. it must be laid in the indictment and proved upon evidence. 1. That either they received wages, or took *prest* to serve the king upon sea or land. 2. That he, that thus imprest them, was commissioned by the king so to imprest them.

Touching clergy in these offenses.

1. He that is convict upon the statute of 18 H. 6. cap. 19. shall have his clergy. *Co. P. C. cap. 26.*

2. Consequently a mariner or gunner, that hath taken wages or prest, shall have his clergy, for the statute of 5 Eliz. cap. 5. extends only the pains and penalties of the statute of 18 H. 6. to this case, and by that statute of 18 H. 6. clergy was not taken away.

3. That a departing contrary to the statute of 7 H. 7. or 3 H. 8. is by those statutes exempted from clergy, only the statute of 3 H. 8. cap. 5. allows men in orders the benefit of clergy.

4. The statute of 2 & 3 E. 6. takes away clergy from those, that depart without license after they have served the king in his wars.

5. By the statute of 1 E. 6. cap. 12. All persons convict of any felony not excepted in that act, whereof this is none, shall have their clergy, as he might have had before 24 April, 1 H. 8. and therefore an offender against 7 H. 7. cap. 1. is ousted of his clergy, because ousted thereof by 7 H. 7. cap. 1. only if they be in orders, they have privilege of clergy by the statute of 3 H. 8. cap. 5.

[680] 6. But if he be indicted upon the statute of 3 H. 8. cap. 5. *quare*, whether he shall not have his clergy, for tho the felony in substance be the same, yet this statute makes it felony to depart without the license of the king's lieutenant; but the statute of 7 H. 7. cap. 1. makes it felony to depart without license of the cap-

(*u*) Or rather were clear, that it could not be legally done without a special att of parliament for that purpose; the like may be argued from some other temporary statutes enacted since our author's time, for authorizing the pressing of soldiers and mariners, *viz.* 2 & 3 Ann. cap. 19. 3 & 4 Ann. cap. 11. 4 Ann. cap. 10. 5 Ann. cap. 15. 6 Ann. cap. 10. &c. &c.

(*x*) But it may be easily perceived, that the reason why our author declines de-

livering any opinion was, because he did not concur with the then prevailing practice, a practice which seems repugnant to the liberties of an Englishman, and inconcileable to the established rules of law, *viz.* that a man without any offence by him committed, or any law to authorize it, should be hurried away like a criminal from his friends and family, and carried by force into a remote and dangerous service.

tain, and therefore *vide supra*, p. 674. whether 3 H. 8. be not repealed by 1 E. 6. as a felony newly made since the first day of the reign of H. 8.

If a man receive imprest to serve the king beyond the sea, and is delivered over to a conductor to be brought to a certain place at the sea side, and is in the king's wages, and runneth away without license of the conductor, all besides [Croke,] Yelverton and Hutton, agreed it to be felony, and the conductor is as to this purpose a captain; but all agreed, that if the conductor at the place delivers him over to another conductor, this second conductor is not a captain within the statute (*y*); but Yelverton and Hutton held, that in neither case it is felony, unless the conductor be also a captain, and so named in the indenture between the king and him, which all agreed to be the safest way.

It was held, that it could not be tried before other justices, than such as are limited by the act, because a new felony, and limited to be tried in another manner than the law directs, *viz.* in the county where taken. *M. 3 Car. Hutt. Rep.* 134. nine judges *versus Croke, Hutton, and Yelverton*, *vide Cro. Car.* 71. the better [greater] opinion was, that it was felony and may be tried before justices of oyer and terminer or gaol delivery, as well as of the peace.

But surely the press-masters or constables, that usually take up men for service, are not captains within the act, neither is the running from them felony within these statutes (*z*).

There are no other felonies newly enacted in the time of [681] queen Mary, but those that were temporary, as 1 & 2 P. & M. cap. 3. telling false news, &c. after a former conviction (*), and 1 Mar. cap. 12. concerning riots.

(y) The resolution here did not distinguish between a first and second conductor, but between a conductor, who by agreement with the captain had the leading them quite thro' to the place of rendezvous, and one who was hired to carry them part of the way, and then deliver them to another conductor; a conductor of this last sort, whether first or second, it was agreed was not a captain within the statute. See *Hut.* 134.

(z) These several acts of parliament enacted for the punishment of soldiers running away from their captains are now in a manner useless, by reason of the frequent

statutes for punishing mutiny and desertion by the martial law, a method more concise and effectual; which, however necessary it may be in the time of war, is by many thought not suitable to English freedom in times of peace and tranquility. See the statutes 1 W. & M. *Sess.* 1. cap. 5. and 6 Geo. 2. cap. 3. between which years they have been often renewd, it not having been judged proper to make them of long continuance, but rather to renew them from year to year.

(*) This offense was not made felony, but was punishable by imprisonment for life, and forfeiture of goods and chattels.

C. H A P. LXIV.

Concerning felonies newly enacted in the times of Queen Elizabeth, King James, King Charles I. and King Charles II.

IN the time of Q. *Elizabeth* there were several acts for making new felonies, and they be ranked into these ranks.

I. Such as were only temporary, or during the queen's life; such were the statutes of 1 *Eliz. cap. 16.* which in some cases made rebellious assemblies felony. 14 *Eliz. cap. 1.* touching withholding the queen's castles and other matters. 23 *Eliz. cap. 2.* touching seditious books, letters, prophecies, calculation of the queen's nativity, &c.

II. Such as were perpetual, or otherwise continued, but afterwards repealed, as 1 *Eliz. cap. 10.* and 14 *Eliz. cap. 4.* touching exportation of leather, repealed by the statute of 18 *Eliz. cap. 9.* 5 *Eliz. cap. 16.* concerning witchcraft, repealed by 1 *Jac. 1. cap. 12.*

III. Such as were perpetual and stand unrepealed, or were [682] temporary at first, and made perpetual, and of these I shall here give a brief account.

By the statute of 5 *Eliz. cap. 14.* It is enacted, "That if any person or persons upon his or their own head or imagination, or by false conspiracy or fraud with others, shall wittingly, subtilly and falsly forge or make, or subtilly cause, or wittingly affent to be forged or made any false deed, charter, or writing sealed, court-roll, or the will of any person in writing, to the intent, that the state of freehold or inheritance of any person or persons, of in or to any lands, tenements or hereditaments, freehold or copyhold, or the right, title, or interest of any person or persons in or to the same, or any of them shall or may be molested, troubled, defeated, recovered or charged; or shall pronounce, publish, or shew forth in evidence any such false or forged deed, charter, writing, court-roll or will as true, knowing the same to be false and forged, as is aforesaid, to the intent above remembered, and shall thereof be convicted, either by action or actions, of *forges of false deeds* to be founded upon this statute, or otherwise according to the order and course of the common law, &c. shall

" pay

" pay the party grieved his double costs and damages, to be set upon
 " the pillory, both his ears cut off, and also his nostrils slit and seared
 " with an hot iron, be imprisoned during life, and forfeit the profits
 " of his lands during life (a).

" Or if any person, as before, shall forge, or affent to be forged,
 " &c. any charter, deed, or writing, to the intent that any person
 " may have a term of years in any lands, not copyhold, or any an-
 " nuity for life, years, or in tail, or fee-simple, or shall forge any
 " obligation, bill obligatory, acquittance, release, or discharge of
 " any debt, account, suit, demand, or other thing personal ; or shall
 " pronounce, &c. *ut supra*, that then he shall pay the party grieved
 " double costs and damages, be set upon the pillory, and lose one of
 " his ears, &c.

" And if any person or persons, being hereafter convict [683]
 " of any of the offenses aforesaid by any of the ways above
 " limited, shall after his or their conviction or condemnation es-
 " tions commit or perpetrate any of the offenses aforesaid; that then every
 " such second offense shall be adjudged felony ; and the parties con-
 " victed or attaint thereof according to law shall suffer death, and
 " forfeit their goods and lands, as in case of felony, without having
 " advantage of sanctuary or clergy ; but the wife not to lose her
 " dower, nor blood to be corrupted, nor heirs disherited.

" Justices of *oyer* and *terminer* and of *assize* to hear and determine
 " the offenses against this act.

" Not to extend to any attorney or lawyer pleading a forged
 " deed, not being party or privy to the forging, nor to the exemplifi-
 " cation of a forged deed, nor to any judge, that shall cause the
 " seal to be set to such exemplification."

Upon this statute, so far as it relates to felony, these things con-
 siderable shall be set down in order.

1. What is a making, forging, or affenting.

If *A.* makes a deed of feofment to *B.* and after makes a deed of
 feofment to *C.* with an ante-date before the other feofment, this was
 a forging within the statute 1*H.* 5. cap. 3. and also within this statute.
Co. P. C. cap. 75. 27 H. 6. 3. a.

But note, that it is not the bare antedating of a deed, that makes
 a forgery, for then most assurances, especially bargains and sales for

(a) Upon this clause of the statute, *Ja-*
ger Croke, alias Sir Peter Strange, was
 convicted, *Pasc. 4 Geo. 2. B. R.* and suf-
 fered the penalties of the act.

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recoveries, leases for years to enable a release would be forgeries; but that which makes it forgery in the former case, is the intent to avoid his own feofment; and the words of this statute are, *to the intent that the estate of another person should be disturbed*; so the intent is to be joined in case of forgery.

Again, if *A* make a true deed of feofment to *B.* of the manor of *Dale*, and after *B.* rase out *D.* and put in *S.* whereby the feofment imports the manor of *Sale*; or if *A.* grants a rent-charge to *B.* for life, and after sealing and delivery *P.* rases the deed, and enlarges the [684] sum or estate, this is a subtle making of a false deed within this statute; *vide 1 Anders. Rep. Puckering's case, Case 151 p. 100.*

An assent after the fact committed, makes not the party assenting guilty, or principal in the forging; but it must be a precedent or concomitant assent.

2. What is a writing sealed, deed, will, or court-rol?

The forging of a false customary of a manor put under seal, whereby the interest of the lord is molested, is a writing under seal within this statute. *Dy. 322. b. Taverner's case.*

The inserting of a clause in a will purporting a devise of lands without warrant or direction of the devisor is the forging of a will within this statute, tho the whole will be not forged, and altho done in the testator's life by the clerk that writes the will. *Co. P. C. cap. 75. against the report of Dy. 288. a. Marvin's case.*

But note, this was when the testator was speechless, but if he had his understanding, and assented to it, or published it afterwards, it is no forgery, tho at first written without his direction.

Forging surrenders, admittances, court-rolls of copyhold lands are within this statute.

If the deed or will forged purport only a lease for years, whereby the freehold is charged, or of a rent-charge for years, it is within this first branch.

A makes a lease for years to *B.* a forging of an assignment of that lease from *B.* to *C.* is a forging of a deed within the second clause, *Co. P. C. ubi supra*, against the opinion in *Noy's Rep. in Markam's case (b).*

But an assignment made here of a term for years of land in *Ireland* is said not to be within this statute, but punishable as a misdemeanour.

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'nor at common law. 29 *Eliz.* *Newman's case*, *Hughes* 3 Part, N. 221.

3. What is a pronouncing or publishing, knowing the same to be forged?

If *A.* forges a deed, and *B.* tells *C.* that the deed is forged, and yet *C.* publisheth it, it was resolved to be within [685] the statute in *Gresham's case*. *P. 38. Eliz. Cam. Stellata (c).*

But it seems to me, tho such a relation may be an evidence of fact to prove his knowledge, yet it is not conclusive, tho perchance *de facto* the deed be forged; for possibly there might be circumstances of fact, that might make the person relating it, or his relation, not credible; so that the *knowing* must upon the whole matter be left to the jury upon the circumstances of the case, and therefore the case of *Gresham* being in the star-chamber, where the lords are judges of the fact upon the evidence, is no authority in this case.

4. What is a writing, bill, bond, acquittance?

A will in writing concerning goods only, is within this clause (*d*).

The forging of a statute staple, or recognizance in nature of a statute staple, is within this statute, because the party's hand and seal are to it; but not to the forgery of a statute merchant or recognizance, because they have not the convisor's seal. *Co. P. C. p. 171. 15 H. 7: 16. a. (e).*

A. writes and seals a letter to *B.* and subscribes it, *B.* cuts off the lower part of the letter with the hand of *A.* and puts to it the seal of his letter, and over it writes an acquittance, this is the forging an acquittance. *Co. P. C. ubi supra.*

I come to the point of felony, having before stated what is a first offense within this statute.

There must be a conviction of a first offense before the second offense be committed, otherwise the second offense is not felony; and

(*c*) This is the same with *Markham's case*, and is cited by lord Coke for this purpose. *Co. P. C. p. 170. in margine.*

(*d*) This seems to be grounded on a mistake of lord Coke, who in his comment on this statute supposes the word *writing* to be inserted in the latter part of this clause, after the words *any obligation or bill obligatory*; whereas it is not so, for the statute makes no mention of *writings*, but only with respect to an interest in lands or annuities, and consequently does not extend

to a will of goods only; and so was the case cited by lord Coke in *Dyer* 302 b. which was of a will of a lease for years, and not of personal goods only; but this case is expressly included in a later statute, *viz. a Geo. 2. cap. 25.* which makes such a forgery felony without benefit of clergy.

(*e*) According to this case it should be quite the reverse; for it is there said, that the statute *merchant* has the seal of the party, which, the book says, is not requisite in a statute *staple*.

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therefore if before conviction of forgery, *A.* commits a first and a second offense, this second offense is not felony within this statute.

And by conviction, I conceive, is intended not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment.

And the indictment for a second offense must recite the record of the first conviction, that it may appear to be a conviction of such a forgery as is within the statute; for if it be not the indictment of felony for the second offense fails.

And upon the evidence, tho the record of the first conviction ought to be proved, yet the matter of the first conviction shall never be re-examined, but must stand for granted, and the party is concluded touching the truth of the matter of the first conviction by the record of that conviction.

If *A.* publish a false deed knowingly, and be convict upon this statute for this offense, and after such conviction forges a deed, this is a second offense, and felony within this statute, tho the publishing be prohibited by one clause, and the forging by another, adjudged *P. 7. Jac. B. R. Booth's case (f), Co. P. C. p. 172.* for the words are, *if he commit any of the said offenses the second time:* and so, if he be convict of forgery, the publication of a forged deed afterwards knowingly is felony, or if he be first convict of the forgery of a countersignature, and after that forges an obligation or acquittance; for the second offense in any of the forgeries or publications is felony, tho it be of a different kind, if the first or second offense be within the statute (g).

The hearing and determining of the offense against this statute are limited to the justices of assize, or *oyer* and *terminer.*

This extends not to the justices of peace, for tho in the commission of the peace there is a clause, *nec non ad audiendum & terminandum,* yet they being commissions of a several nature, they are not comprised under the name of justices of *oyer* and *terminer (h).*

(f) 13 Co. Rep. 34.

(g) But by 2 Geo. 2. cap. 25. the first offense is made felony without benefit of clergy, and extends to all deeds, wills, bonds, writings obligatory, bills of exchange, promissory notes, indorsements, or assignments of bills of exchange, or promissory notes, or acquittances, or receipts

for money or goods, if done with intent to defraud any person; this act was made to continue for five years, and to the end of the next sessions of parliament, and so expired the 15th of May, 1735; but was revived and made perpetual by 9 Geo. 2. ch. 18.

(h) Co. Elix. §7.

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But the court of king's bench may hear and determine these offenses, for they are justices of *oyer* and *terminer* and more. *Co. P. C.* cap. 41. p. 103.

The offenders as to felony in this statute are excluded from clergy and sanctuary.

The statute of 5 *Eliz.* cap. 20. concerning *Egyptians*. *Vide quæ supra super stat. 1 & 2 P. & M.*

By the statute of 8 *Eliz.* cap. 3. " No man shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, received, or taken into any ship or bottom any manner of sheep alive, to be carried or conveyed out of this realm, or out of *Wales*, or out of *Ireland*, or any of the queen's dominions, upon pain of forfeiture of all his goods, the moiety to the queen, the other moiety to the informer, imprisonment, and loss of his left hand; and the second offense to be felony.

" But no corruption of blood or loss of dower.

Justices of *oyer* and *terminer*, gaol-delivery, or of the peace, have power to hear and determine offenses.

The offender hath benefit of clergy, as well in case of felony, as of cutting off the hand. *Co. P. C.* cap. 42.

The statute of 14 *Eliz.* cap. 5. concerning rōgues and vagabonds, is repeal by the statute of 35 *Eliz.* cap. 7. and settled in another way by 39 *Eliz.* cap. 4. and therefore I shall refer it thither.

By the statute of 27 *Eliz.* cap. 2. " It shall not be lawful for any jesuit, seminary priest, or other such priest, deacon, or other religious or ecclesiastical person whatsoever, born within this realm, or any of the queen's dominions, hereafter to be made, ordained or professed by any authority or jurisdiction, derived, challenged, or pretended from the see of *Rome*, to come into this realm or any of the queen's dominions, (except as in that act is excepted,) under pain of high treason.

" And any person, that after the end of forty days shall [688] wittingly and willingly relieve, comfort, aid, or maintain such jesuit, &c. being at liberty and out of hold, knowing him to be a jesuit, seminary priest, &c. shall be adjudged a felon without benefit of clergy.

By the statute of 31 *Eliz.* cap. 4. " If any having the charge or custody of any armour, ordinance, munition, powder, shot, or of habiliments of war of the queen, her heirs or successors, or of

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“ any victuals provided for the victualling of any soldiers, gunners,
“ mariners, or pioners, shall for lucre, or gain, or wittingly, advised-
“ ly, and of purpose to hinder or impeach her majesty’s service, em-
“ bezzle, purloin, or convey away the same, to the value of twenty
“ shillings at one or several times, it shall be felony.

“ The prosecution to be within a year after the offense : no cor-
“ ruption of blood, loss of dower, nor loss of lands, but during the
“ life of the offender.

“ The prisoner allowed to make any lawful proof for his discharge.
“ Clergy not taken away.

By the statute of 35 *Eliz. cap. 1.* It is enacted, “ That if any per-
“ son above the age of sixteen years, who shall obstinately refuse to
“ repair to some church or chapel, or usual place of common prayer
“ to hear divine service established by her majesty’s laws or statutes,
“ and shall forbear to do the same by the space of a month next
“ after without any lawful cause, shall at any time after forty days
“ next after the end of this session of parliament, by printing, writ-
“ ing, words or speeches, advisedly and purposely, go about to per-
“ suade others to inspugn her majesty’s power in causes ecclesiastical,
“ or persuade others to forbear coming to church to hear divine ser-
“ vice, or receive the communion according to law, or to be present
“ at any unlawful conventicle or meeting, under pretense of exercise
“ of religion, contrary to her majesty’s laws; or shall after the forty
“ days willingly join in, or be present at, such assemblies or meet-
“ ings under colour of exercise of religion, contrary to the laws of
“ this realm, then such person being thereof lawfully convicted
[689] “ shall be committed to prison, there to remain without
“ bail or mainprise, till he shall conform and yield to come
“ to some church or chapel, and hear divine service according to the
“ queen’s laws, and make open submission and declaration of his
“ conformity, as by the act is prescribed.

“ And if such person shall not within three months, being required
“ by the bishop of the diocese or justice of peace of the county, where
“ he is convicted, come to some parish church to hear divine service,
“ he shall abjure the realm, as by that act is appointed.

“ And if he shall refuse to abjure, or having abjured shall no go,
“ or else shall return without the queen’s license, it is felony without
“ benefit of clergy.

“ No

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" No los of dower, corruption of blood, nor forfeiture of lands
" longer than the life of the offender.

" Special punishment by forfeiture of 10*l. per mensam*, for such as
" relieve them, except father, mother, &c.

" Not to extend to women or popish recusants.

Tho it were formerly doubted, yet upon great consideration by all
the judges it hath been resolved, that this statute is in force.

But to make up the offense to be felony there are so many circumstances required, that it is difficult to have any legal conviction according to this statute.

1. The party must be above sixteen years old. 2. He must obstinately refuse to come to church, which obstinate refusal cannot be without a request or monition to repair to church. 3. He must forbear to come to church for a month after such refusal without a reasonable cause of absence. 4. He must do some of those acts limited by the statute, as to dissuade coming to church, &c. or after that month's absence be at an unlawful conventicle.

And all these things must be precisely charged in the indictment and proved upon evidence, or otherwise no such commitment, or abjuration, or felony can follow.

And therefore, altho many have been hastily convicted upon this statute upon general indictments of not coming to church, and being at an unlawful conventicle, yet never was any convict before [690]. me upon this offense, because these circumstances were either not laid in the indictment, or not effectually proved.

Besides, it is difficult to say, what conventicle upon pretense of exercise of religion was in those times contrary to the laws of the realm, unless mas, or by mas-priests, tho of late time it hath been settled by special acts of this parliament, viz. (i).

The reason why popish recusants are exempted out of this act is; because there is provision touching them in the next following, viz.

By the statute of 35 Eliz. cap. 2. " If any popish recusant not
" having an estate in lands of twenty marks *per annum*, or goods to
" the value of twenty marks, (other than *feme-coverts*) shall not re-
" pair to his dwelling-house, &c. according to the act, and present

(i) There is a blank here in the M. S. but the acts here meant are 16 Car. 2. cap. 4 and 22 Car. 2. cap. 1. by which statute every assembly for religious worship of five or more besides the family, in other manner than is allowed by the liturgy of

the church of England, is declared to be a conventicle contrary to law; but these acts are now of no force against protestant dissenters, by reason of the toleration act, 1 W. & M. cap. 18.

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" himself and his name to the minister and church-wardens of that
" parish ; or after their coming shall go five miles from their dwell-
" ing, and being therefore taken shall not within three months after
" taking come to church and make their confession of conformity,
" as in that act is express, being therunto required by a justice of
" peace, or by the minister or curate of the parish, then such recu-
" sant being thereunto required by two justices or coroner of the
" county shall abjure the realm for ever ; and if he refuse to abjure,
" or having abjured refuse to go out of the realm, or being gone shall
" return without license, it shall be felony without clergy.

By the Statute of 39 Eliz. cap. 4. All former statutes against rogues
and vagabonds are repealed, and among other things it is enacted,
" That if any rogues shall appear dangerous, or will not be reformed
" from their roguish life by the provisions of that act, it shall be
" lawful for two justices of the limit, whereof one of the *Quorum*,
" to commit him to the house of correction till the next quarter-
[691] " sessions, and then the major part of the justices may ba-
" nish him out of the realm and dominions thereof, to such
" place as shall be assigned by six of the privy council, whereof the
" lord chancellor or treasurer to be one, or condemn him to the
" gallies of this realm ; and if any such rogue so banished shall re-
" turn again without lawful warrant, it shall be felony, to be heard
" and determined in that county of *England* or *Wales* where he shall
" be apprehended.

" But in this case the offender hath clergy.

This act is continued by the Statute of 1 Jac. cap. 25. 3 Car. 1.
cap. 4. and 16 Car. 1. cap. 4.

By the Statute of 1 Jac. cap. 3. It is farther added, " That such
" dangerous and incorrigible rogues shall by judgment of the same
" justices in the sessions be branded in the shoulder with the letter R.
" and be sent to the place of his last dwelling ; and if it cannot be
" known, then to the place of his birth ; and if such rogue be after
" found offending in begging or wandering contrary to this Statute,
" it shall be felony without clergy, and tried in the county where he
" shall be taken.

This act is likewise continued by 3 Car. 1. and 16 Car. 1. cap. 4.

This act doth not take away the punishment by the Statute of
39 Eliz. cap. 4. but gives election to the justices in the sessions to
inflict either.

By

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By the Statute of 39 Eliz. cap. 17. " 1. Idle and wandering soldiers or mariners, or idle persons wandering as soldiers or mariners. " 2. Idle or wandering soldiers coming from sea, not having a testimonial under the hand of a justice of peace, setting down the time and place of his landing, place of his dwelling and birth, and留住 a time for his passage thither. 3. Or exceeding the time limited by his testimonial fourteen days, unless he falls sick, if he be in truth a soldier or mariner. 4. Every wandering soldier or mariner, or every person wandering as a soldier or mariner counterfeiting his testimonial, or having the same forged testimonial about him, knowing the same to be forged, is a felon without benefit of clergy.

This offense may be heard and determined before justices [692] of assize, gaol-delivery, or of the peace, having power to hear and determine felony. No corruption of blood.

If a freeholder will take him into service for a year, and he becomes bound by recognizance, *at per statutum*, no farther proceeding to be against him; but if within the year he depart without license, it is felony without benefit of clergy.

Continued by 3 Car. 1. cap. 4. and 16 Chz. 1. cap. 4.

And thus far for felonies enacted in the time of queen Elizabeth.

In the time of king James these ensuing felonies were *de novo* enacted.

By the Statute of 1 Jac. cap. II. " If any person within his master's dominions of England and Wales, being married, do at any time after marry any person or persons, the former husband or wife being alive, every such offense shall be felony, and the party offending shall receive such proceeding, trial and execution in such county where he or she is taken.

This act hath five exceptions. 1. It shall not extend to such persons, whose husband or wife shall be continually remaining beyond the seas, for the space of seven years together. 2. Or whose husband or wife shall absent him or herself in any place within the king's dominions, the one not knowing the other to be living within that time. 3. Nor to any person divorced by any sentence had or to be had in the ecclesiastical court. 4. Nor to any person whose marriage hath been or shall be declared void by sentence in the ecclesiastical court. 5. Nor to any person or persons for or by reason of any marriage had or to be had within the age of consent.

This

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This felony not to make corruption of blood, or loss of dower, / or
desertion of the heir.

1. Observables upon the body of the act.

Altho. the second marriage be simply void, yet the parliament
thought it just to make it felony.

A. takes *B.* to husband in *England*, and after takes *C.* to husband
in *Ireland*, she is not indictable in *England*, because the offense was
committed out of this kingdom. But if *A.* marries a hus-
[693] band in *Ireland*, and comes into *England*, and marries a sec-
ond husband, here it is felony. The former case was accordingly ruled
at *Newgate* sessions (*k*).

A. takes *B.* to husband in *Holland*, and then in *Holland* takes *C.*
to husband, living *B.* and then *B.* dies, and living *C.* she marries *D.*
this is not marrying a second husband, the former being alive, for the
marriage to *C.* living *B.* was simply void, and so he was not her
husband; but if *B.* had been living, this had been felony to marry
D. in *England*: ruled at *Newgate* sessions about 1648. the lady
Madison's case.

The first and true wife is not to be allowed as a witness against
the husband; but I think it clear the second wife may be admitted
to prove the second marriage; for she is not his wife, contrary to a
foul opinion delivered in July, 1664. at the assizes in *Surrey*, in
Arthur Armstrong's case; for she is not so much as his wife *de facto*.
Vide quæ dixi supra super statut. 3 *H. 7. cap. 2. p. 661.*

2. Observables touching the exceptions.

As to the *first*, If the husband or wife be beyond the seas seven
years, tho the party in *England* hath notice that he or she is living, yet
it is no felony, which appears by the second exception, where the
party is commorant in the king's dominions, if the party hath notice,
it is felony; notice there makes the offense, but not when the husband
or wife is beyond sea; and yet in the former case as well as the latter
the second marriage is void. *Vide 22 E. 4. Consultation 5.*

As to the *second* exception: Suppose the first wife or husband be
absent in *New-England* or *Ireland* seven years, this is beyond the seas,
and so within the words of the first exception, and yet within the
king's dominions, and so not aided by the words of the second excep-
tion, unless without notice; it seems *in favorem vitæ* the words *within the king's dominions* must be intended within *England*, *Wales*, or

(k) 1 *Sid. 171. Kel. 79.*

Scotland.

Scotland, to make both clauses consistent; but however the isle of *Wight* is not beyond the sea within the first clause, because *infra corpus comitatus Southampton*: so for *Scilly*, *Lundy*. *Quære of Guernsey, Jersey.*

As to the third exception: certainly the divorce intended [694] is not *à vinculo matrimonii*, for then without the aid of any proviso either may freely marry; but it must be intended of divorces *à mensâ & thoro*. *P. 12 Car. 1. B. R. Porter's case*, it was doubted, whether a divorce *causâ separatiæ*, were such a divorce as was within this exception, because it seemed rather to be a provisional separation for the wife's safety and maintenance, than a divorce; but it was never resolved. *Cro. Car. 461. (1).*

If there be a divorce *à vinculo*, and one of the parties appeals, tho this suspend the sentence, and possibly may repeal it, yet a marriage pending that appeal is held to be aided by this exception. *Co. P. C. cap. 27. p. 89.* But if the sentence of divorce be repealed, a marriage after is not aided by this exception, tho there was once a divorce.

As to the fifth exception: If either party be within the age of consent, the exception extends to both: *A.* of the age of twenty years marries *B.* of the age of nine years, *A.* marries a second wife, this is aided by the exception, as well as if *B.* had married a second husband before agreement at her age of consent to the first marriage, for either of them may *refilire* before they have both consented. *T. 42 Eliz. B. R. Babington's case, Co. P. C. cap. 27. p. 89.*

But if a woman of twelve years marry a man of fourteen years, a second marriage by either is felony, tho they are infants, because as to matters of this kind, especially the business of marriage, they are at this age adjudged of discretion. *Sed vide supra, cap 3. plenius de hac materiâ.*

3. Observables touching the trial.

The trial to be in the county where the offender is apprehended, is added *cumulative*; for he may be indicted where the second marriage was, tho he be never apprehended, and so may proceed to outlawry, as likewise it may be done upon the statute of *7 H. 7. cap. 1. of soldjers. Co. P. C. cap. 26. p. 87.*

By the statute of *1 Jac. cap. 12.* All former acts against conjuration, enchantments, &c. are repealed, and it is enacted,

(1) *Kel. 27.*

" 1. That

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" 1. That if any person shall use, practise, or exercise any in-
" vocation or conjuration of any evil or wicked spirit.

" 2. Or shall consult, covenant with, entertain, employ, feed, or
" reward any wicked or evil spirit, to or for any intent or purpose.

" 3. Or take up any dead man, woman, or child, out of his or their
" grave, or any other place, or the skin, bone, or any other part of
" any dead person, to be employed in any manner of witchcraft,
" sorcery, charm, or enchantment.

" 4. Or shall use, practise, or exercise any witchcraft, sorcery,
" charm, or enchantment, whereby any person shall be killed, de-
" stroyed, wasted, consumed, pined, or lamed in his or her body, &
" any part thereof.

" Every such person or persons, their aiders, abettors, and com-
" felors, being thereof convict and attaint, shall suffer death as
" felon without clergy.

" 1. If any person shall take upon him by witchcraft, enchantment,
" charms, or sorcery, to tell where any treasure of gold or silver may
" be found in the earth or other secret places.

" 2. Or where goods or things lost or stolen should be found &
" be come at.

" 3. Or shall use any sorcery, to the intent to provoke any person
" to unlawful love.

" 4. Or whereby any cattle or goods of any person shall be de-
" stroyed, wasted, or impaired.

" 5. Or to hurt or destroy any person in his or her body, tho' the
" same be not effected or done.

" First conviction one year's imprisonment without bail, and
" once a quarter to stand two hours in the pillory, and confess his
" or her fault.

" If after conviction he commit the like offense, and be convict
" and attaint of such second offense, he shall suffer death as a felon
" without clergy; but no loss of dower, corruption of blood, nor
" heir disherited.

By the Statute of 1 Jac: cap. 31. persons going abroad with a
plague-sore, felony. But this act is discontinued, as my lord *Che*
[696] faith, Co. P. C. p. 90. bat 3 Car. 1. cap. 4. hath revived or
continued it to the end of the first session of the next parlia-
ment; and by 16 Car. 1. cap. 4. it is continued till repealed.

But it gives no forfeiture of lands, goods, or chattels.

By

By the statute of 3 *Jac. cap. 4.* " If any subject pass out of this realm, to the intent to serve any foreign prince, state, or potestate, or shall pass over the seas, and there shall voluntarily serve any such foreign prince, &c. not having before his or their passing taken the oath prescribed in that act before the customer, comptroller of the port, haven, or creek; or their deputy or deputies, or being a gentleman, or of higher rank, or hath born office of a captain, lieutenant, or other place in the camp shall pass, &c. before he hath taken the oath, and given bond, &c. it is felony.

" The trial shall be in the county where the offense is committed, viz. the place of his departure, tho that be but part of the offense, and there they shall inquire of the rest of the offense committed beyond sea, viz. his service there (*m*).

" The offender hath his clergy.

" No corruption of blood nor loss of dower.

By the statute of 21 *Jac. cap. 26.* " All persons who acknowledge or procure to be acknowledged any fine or fines, recovery or recoveries, deed or deeds enrolled, statutes or recognizances, bail or judgment, in the name of any person, or persons not privy or consenting to the same, and being thereof lawfully convicted or attainted, shall incur the penalties of felons without benefit of clergy.

" No corruption of blood nor loss of dower.

A bail taken before a judge, is not a bail within this statute till it be filed of record; and if it be not filed, the acknowledging thereof in another's name makes not felony, but a misdemeanor only (*).

The statute of 21 *Jac. cap. 27.* for murdering bastard children: this I shall reserve to the title of evidence, *Part II. cap. 99. quod vide ibidem.*

And thus far of felonies in the time of king *James.*

In the time of king *Charles I.* I find not any new enacted [697] felony.

I therefore come to the time of king *Charles II.* (†)

(*m*) *Co. P. C. p. 8o: cap. 4.*

(*) But this is since made felony by 4 & 5 *W. & M.*

(†) Here the manuscript breaks off, our author having proceeded no farther; but to render the work more complete, it is

thought proper to subjoin an account of the several felonies which have been enacted since that time, by which it will appear, that latter times have been no less fruitful in multiplying capital punishments, than former ones were.

*Felonies enacted in the time of king Charles II.***I. Transporting wool.**

By 13 & 14 Car. 2. cap. 18. it is made felony to transport wool out of *England, Wales, or Ireland*; but by 7 & 8 W. 3. cap. 28 the making it felony is repealed, and it is reduced to a misdemeanour, which by that and later statutes is subjected to severe penalties.

II. Coventry's act concerning dismembering or disfiguring.

By 22 & 23 Car. 2. cap. 1. if any shall of malice forethought, and by lying in wait, unlawfully cut out or disable the tongue,

Put out an eye,
Slit the nose,
Cut off a nose or lip,

Or cut off or disable any limb or member of any other person, with intention to maim or disfigure, they, their counsellors, sides, and abettors, shall be guilty of felony without benefit of clergy.

Attainer on this statute shall not work any corruption of blood or forfeiture.

Sir John Coventry, a member of the

house of commons, had a tittle before her assaulted in the street, and his nose which gave occasion to the making this act, which from him was called *Coventry's act*.

Upon this statute, *Cotes* and *Wm. Mervyn* were condemned and executed at Tyburn, 8 Geo. I. for killing the noted Mr. Crisp. See *State Tr. Vol. VI. p. 112*.

III. Maliciously burning stacks of corn, or killing cattle in the night.

By 22 & 23 Car. 2. cap. 7. Whoever shall in the night-time maliciously, unlawfully, and willingly, burn any stack'd corn, hay, or grain, barns or other houses, or buildings, or kilns,

Or shall in the night-time maliciously, unlawfully, and willingly, kill or damage horses, sheep, or other cattle, shall be guilty of felony; but liberty is given to the offender to chuse transportation for ten years.

Attainer on this act shall not work corruption of blood, loss of dower, or inheritance of the heir.

During the short reign of king James II. I do not find any new enacted felony.

*Felonies enacted in the time of king William III.***I. Personating bail.**

By 4 W. & M. cap. 4. Personating another before those who have authority by that act to take bail, so as to make him liable to the payment of any sum of money in that suit or action, is made felony.

[698] II. Counterfeiting lottery tickets.

By 5 & 6 W. & M. cap. 7. 8 Ann. cap. 4. 12 Ann. Jeff. 1. cap. 2. Jeff. 2. cap. 9. 5 Geo. 1. cap. 3 & 9. 7 Geo. 1. cap. 20. The forging or counterfeiting the tickets in the several lotteries appointed by the said acts,

Or standing orders or receipts given out in pursuance of the said acts,

Or altering the number or principal sum thereof,

Or counterfeiting the hand of any person to such order,

Or the bringing any such forged ticket, &c. (knowing it to be so) to the manager, &c. with intent to defraud his majesty or any contributor, is made felony without benefit of clergy.

III. Counterfeiting the stamp.

By 5 & 6 W. & M. cap. 21. 9 & 10 W. cap. 25. 8 Ann. cap. 9. 9 Ann. cap. 11. 5 cap. 23. 10 Ann. cap. 19. 12 Ann. Jeff. 1. cap. 9. 5 Geo. 1. cap. 2. Forging any of the stamps appointed by the said acts,

Or counterfeiting or resembling the impression of the same upon any vellum, parchment, or paper,

Or uttering, vending, or selling any vellum, &c. with such counterfeit impression, knowing the same to be so,

Or using any stamp or marks with intent

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to defraud the crown of the stamp duty, is made felony without benefit of clergy.

IV. Counterfeiting the seal of the Bank, bank-notes, &c.

By 7 & 8 W. cap. 31. §. 36. 8 & 9 W. cap. 19. §. 36. and 11 Geo. I. cap. 9. The forging the common seal of the bank,

Or any bank bill or bank note,
Or erasing or altering any such bill or note,

Or altering or erasing any indorsement, or any bank bill or note;

Or tendering the same in payment, knowing the same to be forged, erased, or altered is made felony.

cap. 7. 11 Geo. I. cap. 17. §. 12. The counterfeiting exchequer bills,

Or any indorsement thereon,

Or tendering such counterfeit bills or indorsement, knowing the same to be counterfeit, with intention to defraud his majesty, or any other person, is felony without benefit of clergy.

V. Counterfeiting exchequer-bills.

By 7 & 8 W. cap. 31. §. 78; 9 W. cap. 2. §. 3. 5 Ann. cap. 13. 7 Ann. cap. 7. 9 Ann.

VI. Blanching copper, &c.

By 8 & 9 W. cap. 25. Blanching copper for sale, or mixing blanched copper with silver,

Or knowingly buying or selling, or offering to sale such, or any other malleable mixture of metals or minerals heavier than silver, and wearing like gold.

Or receiving, paying, or putting off any counterfeit, or unlawfully diminished milled money (not cut in pieces) at a lower rate than it imports, or was coined or counterfeited for, is made felony.

Felonies enacted in the time of queen Anne.

I. Wilfully destroying any ship.

By 1 Ann. Jeff. 2. cap. 9. and 4 Geo. I. cap. 12. It is felony for any captain, master, mariner, or other officer belonging to any ship wilfully to cast away, burn, or destroy the said ship, or procure the same to be done to the prejudice of the owner.

Or for the owner, captain, &c. to do the like, to the prejudice of any underwriter of the policy of insurance, or of any merchant, who shall load goods therein.

The occasion of making this act see *supra* p. 230. in notes.

IV. Counterfeiting the seal of the South-Sea company, South-Sea bonds, &c.

By 9 Ann. cap. 21. It is felony without benefit of clergy to forge or counterfeit the common seal of the South-Sea company,

Or to forge, counterfeit, or alter any of their bonds,

Or knowingly to tender, or offer to dispose of the same, with intent to defraud any person, see 6 Geo. I. cap. 11.

V. Making an hole in a ship, or stealing any pump from a ship.

By 12 Ann. cap. 18. made perpetual by 4 Geo. I. cap. 12. The making any hole in a ship in distress,

Or stealing any pump belonging to such ship, or aiding or abetting thereto,

Or wilfully doing any thing tending to the immediate loss of such ship, is made felony without benefit of clergy.

Felonies enacted in the time of king George I.

I. Concerning riotous assemblies.

By 1 Geo. I. cap. 5. (which is for the most part copied from an expired act of 1 Mar. cap. 12) if twelve persons or more, being unlawfully and riotously assembled,

shall so continue together to the number of twelve for the space of one hour after proclamation made to depart, such continuance is made felony without benefit of clergy;

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As also to oppose or hinder the reading the proclamation,

Or to continue to the number of twelve for one hour after such hindrance so made, having knowledge thereof;

By the same act it is felony without benefit of clergy for any persons, unlawfully and riotously assembled, with force to pull down, or begin to pull down any church, or chapel, or building for religious worship allow'd by the toleration act, or any dwelling-house, barn, stable, or other out-house.

II. Maliciously burning any wood or coppice.

By 2 Geo. 1. cap. 48. and 6 Geo. 1. cap. 26. It is felony for any person maliciously to set on fire or burn any wood, underwood, or coppice, or any part thereof.

III. Returning from transportation, taking a reward for helping to stolen goods, &c.

By 4 Geo. 1. cap. 11. If any offender ordered for transportation beyond sea shall return to, or (by 6 Geo. 1. cap. 23.) be found at large in Great Britain or Ireland, without some lawful cause before the expiration of his term, without licence from his majesty, he shall be guilty of felony without benefit of clergy.

By the same statute, whoever shall take any money or reward under pretence of helping any person to stolen goods, unless he apprehend the felon, and give evidence against him at his trial, shall be guilty of felony, and shall suffer in the same manner as if he had stolen them himself, with such circumstances, as the same were stolen.

Upon this clause *Jonathan Wild* was executed, to Geo. 1.

IV. Counterfeiting army debentures.

By 5 Geo. 1. cap. 14. 6 Geo. 1. cap. 17. 9 Geo. 1. cap. 5. It is felony without benefit of clergy for any person to alter or counterfeit any army debentures,

Or fraudulently to issue out any other than for the sums certified by the commissioners.

[700] V. Counterfeiting South-Sea receipts or warrants, &c.

By 6 Geo. 1. cap. 11. It is made felony without benefit of clergy for any one to alter, forge, or counterfeit any South-Sea receipt for a subscription to the stock,

Or warrant for a dividend,

Or any indorsement or writing thereon, Or knowingly to tender or offer to dispose of the same with intent to defraud any one.

VI. Counterfeiting the seal of the two assurance companies.

By 6 Geo. 1. cap. 18. The counterfeiting the corporation seal of either of the assurance companies, now known by the names of the Royal Exchange and the London Assurance,

Or altering any policy, bill, bond, or other obligation under their common seal,

Or knowingly paying away such policy, &c. or demanding the money thereon, is felony without benefit of clergy.

VII. Maliciously spoiling the garments of any persons in the streets.

By 6 Geo. 1. cap. 23. The wilful and malicious tearing, spoiling, cutting, burning, or defacing the garments or clothes of any person in the streets or highways is felony.

VIII. Smuggling.

By 8 Geo. 1. cap. 18. If any person above the number of five carrying offensive arms, or being in disguise, shall be found passing with foreign goods from any ship without due entry and payment of the duties,

Or shall forcibly resist any officer of the customs or excise in the seizing sum goods, they shall be guilty of felony.

IX. Counterfeiting the name of, or perforating a proprietor for transferring stock, or receiving dividends.

By 8 Geo. 1. cap. 22. To counterfeit the name of any proprietor,

To forge or procure to be forged, or wilfully to act and assist in forging a letter of attorney, or other instrument to transfer any share in the capital stock of any corporation established by act of parliament,

Or to receive any annuity, or dividend attending such share,

Or failly to perforate any proprietor for the purposes aforesaid, is felony without benefit of clergy.

X. The like as to annuity orders.

By 9 Geo. 1. cap. 12. To do the like with relation to any annuity order, is made felony without benefit of clergy.

XI. The

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XI. The *Waltham-black* act against appearing in disguise in any forest, &c. unlawfully hunting deer, robbing any warren, destroying fish, maiming cattle, destroying trees in any avenue, &c. firing houses, stacks of corn, &c. maliciously shooting at any person, sending threatening letters, &c.

By 9 Geo. 1. cap. 22, continued by 12 Geo. 1. cap. 30. and 6 Geo. 2. cap. 37. till Sept. 1, 1736, and from thence to the end of the next session of parliament, it is made felony without benefit of clergy, for any person armed with offensive weapons, and having his face blacked, or otherwise disguised, to appear in any forest, chase, park, &c. or in any high road, open heath, common, or down;

Or unlawfully and wilfully to hurt, wound, kill, or steal any red or fallow deer,

Or unlawfully to rob any warren, &c.
Or to steal any fish out of any river or pond;

Or unlawfully to break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed.

Or unlawfully and maliciously to kill, maim, or wound any cattle,

Or to cut down, or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation for ornament, shelter, or profit,

Or to set fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood,

Or maliciously to shoot at any person in any dwelling-house or other place.

(Upon this clause Edward Arnold was convicted at Surrey Lent-sessions, 1723-4, for shooting at lord Onslow.)

[701] Or knowingly to send any letter without any name, or signed with a fictitious name, demanding money, venison, or other valuable thing,

Or forcibly to rescue any person being lawfully in custody for any of the offenses before-mentioned,

Or to procure any person by gift or promise of money, or other reward, to join in any such unlawful act.

No attainer on this act shall work corruption of blood, loss of dower or forfeiture.

This act was occasioned by the devastations and injuries then lately committed in a violent manner by several persons near Waltham, who had appeared blacked and disguised in the chases, forests, &c. and

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was from thence called the *Waltham-black* act.

XII. Concerning the pretended privilege of the *Mint* in Southwark.

By 9 Geo. 1. cap. 28. If any person shall within the place commonly called the *Mint*, or the pretended limits thereof, wilfully obstruct any person serving or endeavouring to serve or execute, any will, warrant, or legal process, &c.

Or shall assault, or abuse any person for having so done, whereby he shall receive any damage or bodily hurt;

Or shall oppose any officer of justice, or person aiding such officer in the execution of any writ, warrant, or process, &c. or shall be abetting thereto;

Or shall rescue, or knowingly harbour or conceal any prisoner taken upon such process;

Or shall presume to exercise any unlawful jurisdiction for supporting the pretended privilege within the said place, such offender shall be adjudged guilty of felony, and be transported for seven years.

And if any person wearing any vizor, &c. or having his face or body disguised, shall join or abet any riot, or oppose the execution of any legal process, &c. within the limits aforesaid, such offender shall be adjudged guilty of felony without benefit of clergy.

And every person aiding or abetting, concealing or harbouring such disguised person, shall be adjudged guilty of felony, and be transported.

XIII. The like with respect to *Wapping, Stepney, &c.*

By 11 Geo. 1. cap. 22. The same provision is made against most of the said offenses, if committed within the hamlet of *Wapping, Stepney*, or any other place within the bills of mortality, whereof presentment shall have been made by the grand jury at a general or quarter-sessions.

XIV. Counterfeiting *East-India* bonds, or indorsements thereon, or on *South-Sea* bonds, &c.

By 12 Geo. 1. cap. 32. Whoever shall forge or counterfeit, or wilfully assist in forging or counterfeiting the name or hand of the accountant-general, the court of chancery, the register, clerk of the court, report-office, or any of the cashiers of the bank of *England*; to any certificate, report, &c.

Or any *East-India* bond or indorsement thereon;

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Or

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Or any indorsement on any *South-Sea* bond, shall be adjudged guilty of felony without benefit of clergy.

XV. Assaulting any master wool-comber, weaver, maliciously breaking tools, &c.

By 12 Geo. 1. cap. 34. If any person shall assault any master wool-comber, or master weaver, or other person concerned in the woollen manufacture, whereby he shall receive any bodily hurt; for not complying with any such illegal by-laws, &c. *at in the act mentioned,*

Or shall write or send any threatening letter to such person for not complying with such illegal by-laws, or with any de-

mands or pretenses of his workmen, or others employed by him in the woollen manufacture, he shall be deemed guilty of felony, and be transported for seven years.

If any person shall maliciously cut or destroy any woollen goods in the loom or on the rack;

Or shall destroy any rack on which such goods are hanged in order to dry;

Or shall wilfully break any tools used in the making such woollen goods, not having the consent of the owner so to do;

Or shall break or enter by force into any house or shop by night or by day for any of the purposes aforesaid, such offender shall be adjudged guilty of felony without benefit of clergy.

[702] Felonies enacted in the time of king George II.

I. Maliciously breaking down turnpikes.

By 1 Geo. 2. cap. 19, 5 Geo. 2. cap. 33. & 8 Geo. 2. cap. 20. It is made felony without benefit of clergy for any person maliciously to break down or destroy any turnpike-gate or other fence belonging to such turnpike erected to prevent passengers from passing by without paying the toll, or forceably to rescue any person lawfully in custody for such offence.

Attainer by this act not to work corruption of blood, loss of dower, or forfeiture.

II. Forging of deeds, stealing bonds, &c.

By 2 Geo. 2. cap. 25. The forging or counterfeiting, or procuring to be forged or counterfeited any deed, will, bond, writing obligatory, bill of exchange, promissory note for payment of money, the indorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt for money or goods, or knowingly to utter or publish as true any forged deed, &c. with intention to defraud any person, is felony without benefit of clergy.

By the same statute to steal or take by robbery any bonds, notes, orders, tallies, &c. is felony of the same nature, and in the same degree, as if the money secured by such bonds, &c. and remaining unsatisfied, had been stolen or taken by robbery.

This act was made to continue only for five years from 29 June 1729, and from thence to the end of the then next sessions of parliament.

III. Stealing lead, iron, &c. fixt to any house or building.

By 4 Geo. 2. cap. 32. To steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron palisado, or iron rail fixed to any dwelling-house or other building used with such dwelling-house, or fixed in any garden, orchard, courtyard, fence or outlet belonging to any dwelling-house or other building is felony, and so it is in the aiders and abettors; and such as shall buy or receive such lead or iron, knowing the same to be stolen.

IV. Assaulting with an intent to rob.

By 7 Geo. 2. cap. 21. It is made felony with any offensive weapon or instrument unlawfully and maliciously to assault, or by menaces, or by any forceable or violent manner to demand any money, goods or chattels of any person, with a felonious intent to commit robbery on such person.

V. Counterfeiting the acceptance of a bill of exchange, or any accountable receipt.

By 7 Geo. 2. cap. 22. If any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be counterfeited, &c. any acceptance of any bill of exchange, or the number, or principal sum of any accountable receipt, for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intent to defraud any person, or shall with such intent knowingly utter or publish the same as true, he shall be deemed guilty of felony.

[For the continuation of felonies enacted since the 7 Geo. 2. see p. 712 &c.]

C H A P. LXV.

Certain general observations concerning felonies by act of parliament.

1. **G**ENERALLY if an act of parliament be, that if a man commit such an act, he shall have judgment of life and member, this makes the offense felony, and this was ordinarily the clause used in antient statutes, as *Westm. 2. cap. 34. (a)*, 14 E. 3., cap. 10. 28 E. 3. cap. 3. 13 R. 2. cap. 3. &c. *Co. P. C. cap. 29. p. 91.*

2. And consequently there ensued thereupon corruption of blood, eschete to the lord, and the wife's loss of dower.

3. But yet there may be and frequently are in acts of parliament, making new felonies, provisions, that there shall be no corruption of blood, disinherition of the heir, or loss of dower; and this is done sometimes by enacting words, as in 1 *Jac. cap. 31.* for going abroad with a plague-fore, sometimes by a proviso, that it shall not extend to corruption of blood, loss of dower, &c. as 8 *Eliz. cap. 3.* 5 *Eliz. cap. 14.* and sometimes by the words *saving to the wife her dower, and to the heir his inheritance*, as upon the statute of 1 *Jac. cap. 12.* for witchcraft.

4. But notwithstanding such a clause, the king shall have the forfeiture of his lands during his life, and also his goods, for no eschete can come to the lord, where the inheritance is saved to the heir.

5. But by a special clause, forfeiture of goods as well as of lands may be provided against, as in the act of 1 *Jac. cap. 31.* of going out with a plague-fore. *Co. P. C. cap. 6. p. 47.* and *cap. 28. p. 90.*

6. A saving or exclusion of corruption of blood doth [704] virtually make the heir inheritable, and saves also the woman's dower. *Co. P. C. cap. 28. super statut. 1 Jac. cap. 31.*

7. By an act making a new felony, clergy is not excluded from the offender, without special words. *Co. P. C. cap. 19. p. 73. super statut. 8 H. 6. cap. 12.* against stealing records.

8. In all acts making a new treason, felony, or misprision of treason, peers are to have their trial by their peers, tho no special clause

(a) See 2 *Co. Infus. p. 434.*

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enacting it. *Co. P. C. cap. 27. p. 89. super statut. 1 Jac. 6. cap. 11.* for marrying two husbands.

9. An act making any offense to be a felony, tho' it speaks not of accessories before or after, yet they are impliedly contained (*b*).

10. Nay, altho' the statute makes an offense to be felony in them that commit it, their counsellers, procurers, and abettors, to be felons, and speaks nothing of accessories after; yet by the opinion of my lord Coke, receivers and accessories after are also virtually implied, as in the statute of *Westm. 2.* in rape, *Co. P. C. cap. 19. p. 72.* upon the statute of *3 H. 7. cap. 2.* for carrying away women, *Co. P. C. cap. 12. p. 61.* upon the statute of *5 H. 4. cap. 4.* against multiplication, *Co. P. C. cap. 20. p. 74.* upon the statute of *1 Jac. cap. 12.* of witchcraft, *Co. P. C. cap. 6. p. 45. in fine,* tho' *Stamford* be of another opinion (*c*).

11. An act, that makes an offense by name, as rape, &c. to be felony, virtually makes all that are present, aiding, and assisting principals, tho' one only doth the fact, tho' as to point of clergy in some cases it differs; *de quo posse.*

12. An act, which makes the offender, his counsellers and abettors, guilty of felony, yet regularly makes not the counsellers, procurers or abettors principals, unless present, but, if they be absent, leaves them in the condition of accessories before, as upon the statute of *1 Jac. cap. 12.* of witchcraft, and other statutes of that kind, unless in express words it makes them all principals, as is done by the statute of *3 H. 7. cap. 2. Co. P. C. cap. 12. p. 61.* the only instance of that kind.

[705] 13. In an act limiting a second offense to be felony, but the first only a misdemeanor, there must be two things to make the second offense felony, viz. 1. A judgment given for the first offense. 2. The second offense must be committed after the judgment for the first, otherwise it makes not felony, as in case of forgery upon the statute of *5 Eliz. cap. 14. Co. P. C. cap. 75. p. 172. (d)*, and upon the statute of *1 Jac. cap. 12.* of witchcraft. *Co. P. C. cap. 6. p. 46. 2 Co. Insti. p. 468.*

14. Therefore where those and some other statutes speak of a second offense after a conviction of a former, it is not intended barely of

(*b*) *Co. P. C. p. 59.*

(*c*) *Stamf. P. C. fol. 44. b.*

(*d*) *Vide supra, p. 685.*

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a conviction by verdict, unless judgment be given upon it. *Co. P. C.* p. 46.

15. An act making a felony, and limiting it to be tried in the county where the party is apprehended, unless there be negative words, *and not elsewhere*, is but cumulative, and he may be indicted where the offense was committed, as upon the statute of 1 *Jac. cap. 11.* marrying a second husband or wife, *Co. P. C. cap. 27.* p. 83. and upon the statute of 7 *H. 7. cap. 1.* and 3 *H. 8. cap. 5.* soldiers departing. *Co. P. C. cap. 26.* p. 86, 87.

16. A second statute enacting the same offense to be felony, that was so enacted before, with some alterations is but cumulative, and no repeal of the former act; as the statute of 3 *H. 8. cap. 5.* of soldiers making their departure without the licence of the king's lieutenant felony (where the act of 7 *H. 7. cap. 1.* makes it felony, if without the captain's licence), yet repeals not the former, because it is but an affirmative act; so 39 *Eliz. cap. 4.* for banishing incorrigible rogues is not taken away by 1 *Jac. cap. 7.* which adds burning in the shoulder, and sending them to their last habitation.

17. If one statute be grafted upon another statute relative to it in order to the better execution of a former statute, if the former be repealed, the latter is thereby virtually repealed, as the statutes of *Labourers* (e) being repealed by 5 *Eliz. cap. 4.* the statute of 3 *H. 6. cap. 1.* making congregations of masons felons is thereby [706]. repealed (f). *Co. P. C. cap. 35.* p. 49.

18. If a statute be but temporary and discontinued, and then revived by a new act of parliament; or if a statute be made touching a new felony, and repealed and re-enacted, the conclusion of the indictment *contra formam statutorum* is good; but the best way is to conclude *contra formam statut. in hujusmodi casu edit. & provis.* with an abbreviation, because in construction of law it shall be taken either *statuti* or *statutorum*, which may best maintain the indictment in point of law (g).

19. A statute making a new felony of an offense, that consists of an act partly in the kingdom, and partly out of the kingdom, and limiting it to be tried where the offense is committed, shall be con-

(e) 23 *E. 3. cap. 1.* [and 25 *E. 3. cap. 1.*]

(f) For this last mentioned statute recites as the ground thereof, that the congregations of masons had violated the good effects of the Statutes of *Labourers*.

(g) But this piece of our author's advice cannot now be observed, because by the late acts of 4 *Geo. 2. cap. 26.* & 6 *Geo. 2. cap. 6.* all indictments, informations, &c. are required to be in words at length, and not abbreviated.

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strued to be where that part of the offense is committed, that is within the kingdom, as upon the statute of 1 Jac. cap. 2. passing the sea, and serving a foreign prince, without taking the oath of obedience, shall be tried in that county where the part was that he passed the sea. *Co. P. C. cap. 23. p. 80.*

20. An act making a new felony extends not to an infant under the age of discretion, *viz.* fourteen years old; but if he be of that age, it binds him. *Plowd. Com. 463. a. Eyton and Stud's case.*

21. Whether the word *king* is personal to the then king, or extends to his successors in acts of parliament? It is true in grants of judicial or ministerial offices that concern administration of justice, as judges or sheriffs, a grant of such an office, *durante benefacito regis*, is simply determined by the king's death. 12 Co. Rep. p. 48. Nay the grant of a judicial office by the king *quam diu se bene gesserit*, tho' it be a freehold, determines by the king's death; for it is personal to the king that grants them; but it is held, that the grant of offices of another nature, or of lands *durante benefacito nostro* doth not determine by the death of the king without [707] some act or declaration by the successor to determine it. 12 Co. Rep. p. 48, 49.

But as touching acts of parliament, regularly the word *king* extends to his successors (*h*), and therefore the statutes of 11 H. 7. cap. 18. for service in the king's wars, 7 H. 7. cap. 1. for departing of soldiers, tho' the preamble seems personal to that king, yet (it hath been ruled) do include successors, *Co. P. C. cap. 26. p. 86. Dy. 211. a.* so the statute of 23 H. 8. cap 4. for brewers, *Noy's Rep. p. 118. Chalchman and Wright.* So *Poyning's law*, 10 H. 7. in *Ireland*, for the manner of passing acts of parliament, tho' that act speaks only of the *king*, without *successors*, yet it extends to his successors, and so declared 3 & 4 P. & M. cap. 4. in *Hibernia*, 12 Co. Rep. 109. b. 110. a.

And altho' the power of altering the laws of *Wales* was a great trust reposed in H. 8. by the statute of 34 H. 8. cap. 26. for *Wales*, and was thought by some to cease by his death, 12 Co. Rep. p. 48. yet they durst not rest upon that, but it was specially repealed by the statute of 21 Jac. cap. 10.

A statute made to continue during the king's pleasure, doth not determine by his death, unless it be specially relative to the person

(b) *Vide supra*, p. 200.

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of the king, as during the pleasure of the king that now is, or according to some *dicti domini regis*, M. 24 Eliz. *Moor's Rep.* n. 311. p. 176. *per Mede*; and therefore it seems that in such case the successor must make some proclamation or declaration of record to determine it, before it be determined; as upon the statute of 8 H. 6. cap. 11. for the manner of taking apprentices in *London*, which was in truth the case in *Moor*, n. 311. but the statute of 5 Eliz. cap. 4. repealing all acts touching apprentices and labourers, and making a special provision to save the customs of *London*, hath quieted that question.

By the statute of 8 H. 6. cap. 24. it is enacted, "That no *Englishman* sell to any merchant alien any merchandize, but for ready payment." By the statute of 9 H. 6. cap. 2. it is enacted, "That notwithstanding the former statute they may sell for six months time, and this ordinance shall endure so long as shall please the king." It is held 10 H. 7. 7. b. that this statute [708] remains as a suspension of the former act of 8 H. 6. notwithstanding the death of *Henry VI.* till repealed by proclamation by his successor.

And yet in case of capital offenses limited, and *de novo* enacted by act of parliament to continue during the king's pleasure, it is not safe to proceed upon them after the king's death; and tho in matters of misdemeanors such continuance is limited by acts of parliament, yet I do not remember any such kind of limitation in acts enacting capital offenses, but they are either perpetual, or limited to continue for a time certain, as seven years, &c. or till the end of the next session of parliament, &c.

22. An act of parliament, that makes an offense felony, doth consequently introduce the punishment of concealing, that is, misprision of felony; and every offense made felony by act of parliament, includeth misprision, and the party may be indicted of misprision of felony, and thereupon fined and imprisoned, 2 R. 3. 10, 11. And yet in *Co. P. C.* p. 133. upon the statute of 33 H. 8. cap. 1. of false tokens, it is said, where a corporal punishment only is inflicted by act of parliament, the party cannot be fined and imprisoned, which is to be understood with two cautions, viz. 1. Where the indictment, &c. is grounded for the same offense contained in the statute, and therefore it crosseth not the case of

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2 R. 3. for there he was indicted for *mispriſion*, and not for *felony*. 2. Where it was an offence at common law, there if the indictment be grounded barely at common law, he may be fined and imprisoned, tho the statute limit a corporal punishment, as in case of false tokens he may be indicted as a cheat (*).

(*) Here our author had wrote the title had referred what he thought needful to of another chapter *Touching Piracy*, but be said on that head to the chapter of did not proceed in it, perhaps because he *Clergy*, Part II. cap. 50.

THE END OF THE FIRST VOLUME.

Addenda in Notis.

*Ad. p. 270. l. 19. Rot. Parl. 11 H. 6.
n. 43.* A Roy nōtre Souveraine Seigneur beschen humbly your communes of this present parliament, that where one John Carpenter of Bridbam in the shire of Saffes husbandman, the viii day of Feuerer the yere of youre noble reigne the viii, sayng to Isabell his wyff, that was of the age of xvi yere, and hadde be maried to hym but xx dayes, that they wold goo togodre on pilgrimage, and made to arraye him in his best arraie, and toke hir with hym fro the said toun of Bridbam to the toun of Stougbton in the said shire, and there with woode he smote the said Isabell his wif on the heade that the brayne wende oute, and with his knyf gaf hir many other dedly wounches, and streped hir naked out of his clothes, and toke his knyf and fylte his belly from the brest doun, and toke his bowells oute of his body, and loked if she were with child. And thus the said John murdrid horibly his wif, &c. which horibly murdre the Thurday next after the fest of Saint Ambrose the bishop, the yere of youre reigne by foreseid, the said John was entid before Sir John Boban Kt, Sir Henry Hussey Kt, and Will. Sydney your commissioners of your pees withinne the shire foreseid, and proceese made out upon the same enditement according to your lawes till the fame John Carpenter was outlawed of the said moudure, and now gratiouly for the same cause arreste, and in your presence called the king's bench: Please hit to youre his right wisenesse to considere the horrible moudure foreseid, and by autorite of this your hic court of parliament to ordene, that the said John Carpenter may be juged as a traytour, and that your jugges have power to give judgement upon him to be drawed and hanged as a traytour, in eschewyng of such horrible moudurs in tym comyng, sayng allwayes to the lords of the fee eschetes of his lands after yere, day and waft.

Pur ceo q'il semble encoultre la libertee de Seign Esngle, le Ray s'advisera.

Ad. p. 384. l. 6. after electa r. scripture facit contraria, for so Grafted expell himself, altho these words are omitted in our author's M. S. See Mat. Paris, p. 874.

Ad. p. 396, no^t. (n) in fine. The truth is, the writ for burning Sawre was indeed a special act of parliament made for that purpose, for so is a writ test'd per regem & concilium in parlimento to be intended. See the prince's case. 8 Co. Rep. fol. 19. a. Nor do I find any footsteps of heresy being punished capitally before this statute and that of 2 H. 4. The notion that the writ de heretico comburendo lay at common law seems to be a mistake, for

tho that writ be in the printed register, yet it is not in the antient manuscript registers; see State Tr. Vol. II. p. [275]. That this was not the antient punishment of heretics in England; see Mat. Paris, p. 105. for Bratton [Lib. III. de coronâ cap. 9.] Britton [cap. 6] Flota [Lib. I. cap. 29 & 37] speak not of heretics, but of apotates and infidels: And tho by the imperial law some particular heretics were punishable with death; see Cod. Lib. I. tit. 5. l. 11, 12, &c. yet it does not appear, that even in the empire heresy in general was punished capitally, till the constitution of Frederic II. about the year 1234, which indistinctly adjudges all heretics to the flames: but in England the usual punishment seems to have been imprisonment, and even this was not allowable, tho he were *hereticus contumax*, before the pretended statute of 5 R. 2. without the king's special license, an instance whereof is in Rymer's Fœdera, Tom. VI. p. 651. *Rex ueerabilis episcopo Londoniæ salutem. Quia acceptimus per inquisitionem uestram, quod Nicholaus de Drayton— coram vobis congruè convulsi & pro heretico adjudicatus existit, quodque in suo errore neplando animo indurato nequiter perseverans, ad fidei carbonaciam redire non curavit nec curat in præfatis, licet scipias ad hoc exortatus & inductus, sententiam majoris excommunicacionis in bac parte incurrendo. Cum igitur sancta mater ecclesia ita tales haereticos persequitur, ut suo veneno alios inficiant, ut in carcerebus custodiari præcipiat. Super quo nobis supplicabis, &c.* *Nos supplicationi vestrae prædictæ gratiantur concedentes, ad ipsum Nicholaum haereticum carcerali custodie uestra mancipare, & ipsam in carcere vestro custodire faciendum, q. ouique dictum errorem suum revocaverit; & ad fiduci catholicæ unitatem redire voluerit, quantum in nobis est,* [710] *lentientiam concedimus speciem.* Rot. Pat. 44. E. 3. p. 1. m. 23. dorso.

Ad. p. 490. in fine. *Placita coram justiciariis itinerantibus apud crucem lapidem in eom. Midd. anno 2 E. 1. incipiente 3. Rot. 13. in dorso.* Seyton^t Alicia de Covale was arraigned pro morte Jobannis Lipertung, and pleaded, that she killed him *se defendendo*, *ec quod burgavit domum suam; & de bono & malo ponit se super patriam;* *& xii juratores dicunt, quod prædicta Alicia occidit prædictum Jobannem se defendendo, ec quod voluit domum suam burgasse, & ipsam occidisse, si posset.* *Ideo inde quieta. Et catalla prædicti Jobannis confiscantur.* *Placita coram eisdem justicibz ibidem.* Rot. 14. in dorso. Thomas le Chapeleyn sequitur, & in feloniam frigidi officii domini Isabellæ Lucas de Botewell. hue and cry was raised,
and

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and he was pursued, and killed *in fugiendo* by one *William le Jeune*. *Jeune* brought the king's pardon pro morte illâ, " Ideò conceditur ei firma pax, & quia pres-
dictus *Thomas le Chapelyn* occisus fuit " in fugiendo, catalla ejus confiscantur."

*Ad. p. 508. l. 15. comes into the dwelling-
house, but as the case is reported in *Kel.
31.* he was indicted for breaking into the
house. Vide infra Part II. p. 358.*

Ad. p. 566. l. ult. H. 7 E. 2. Rot. 88.
This was the case of *Thomas de Hedgerete* and *J. bn de Uffione*, who being convicted eo quod incendium & combuſionem domorum vicie de Lenne ex prærogatâ malitîa felonice perpetrârunt, had judgment quod sus-
pendentur.

Ad. p. 602. M. 28 E. 3. Rot. 32.
" The abbot of St. Albans was impleaded " coram rege, pro evasione prælouum à " gaoliâ de *Saint Albans*, cuius custodiâm " idem Abbas habet, ut de jure abbathiae " fuit;" amongt whom was *John de Hermyngford* a clerk convict; but upon the jury's finding, " quod idem *Johnnes de Hermyngford* tempore evasione præ-
dictæ, seu aliquo momento ante recap-
tionem ejusdem, non fuit extra viatum " custodia dictæ gaoliæ sub prædicto Ab-
bate, consideratum est, quod prædictus " Abbas est inde quietus."

M. 45 E. 3. Rot. 17. This was the case of *William Baker*, who was taken *cum bo-
nis & catalis suratis* by the constables of *Danbury*, and set in the stocks, from whence he escaped; upon which the said constables were brought *coram rege ad responendum, &c.* and pleaded, " quod " postquam latro ceppos fregit, ipsi eam " recentè infecuti fuerunt, viatum super " ipsum semper habente," till they re-
took him, and committed him to the gaol of the said town; " et quod prædictus " latro adhuc in eadem gaoliâ existit, &c." The king's attorney replied, and joined issue with them, as to their keeping constant view of him till he was retaken. " Et juratores dicunt, quod prædictus

" Inter arrestatus & captus fuit per eosdem " constabularios, & in ceppis positus, & " quod idem constabularii prædictum ha- " tronem postea permiserunt evadere, " absque hoc quod ipsi habuerunt viatum " super præstatum latronem in evadendo, " prout ipsi superioris allegarunt, Ideò con- " sideratum est, quod prædicti constabu- " larii erga dominum regem de centum " solidis pro evasione prædicta oneren- " tur."

Ad. p. 621. Mich. 7 R. 2. Rot. 3. This was the case of *John*, Vicar of *Rewnd Cburch* in *Cambridge*, who was indicted, that whereas one *William Gore* an approver, prisoner in the castle of *Cambridge*, " lai- " cus erat tempore captionis corporis fui, " jam per assenum, & licentiam gaolarii, " & janitoris ibidem, irruditus [eruditus] " est, & informatus de leturâ [literaturâ] " per eundem vicarium, &c." Upon this indictment the vicar surrendered himself " coram rege, and was arraigned *de felonâ prædictâ*, and pleaded not guilty. The court bailed him till his trial, which was before the judges of *nisi prius* at *Cambridge*, where the jury found, " Quod prædictus " *Johnnes* vicarius in nullo est culpabilis " de felonâ, nec de aliquibus articulis habi " impositis, nec unquam se eâ occasione " retraxit. Ideò consideratum est, quod " eat inde quietus."

Ad. p. 677. The reason why I say *preh* must now be understood in the active sense, is because, tho' it be vulgarly used in a passive signification for being taken away by compulsion, yet in legal understanding it cannot now be applied to any to make him a listed soldier, and subject to penalties as such, unless he actively do something, as taking earnest, or the like, whereby he voluntarily consents to his being listed, and so amounts to the same as *taking preh.*

Ad. p. 695. The statute of 1 *Yor. cap. 12.* against conjuration, witchcraft, &c. is lately repealed by an act of this present parliament, *viz. 9 Geo. 2. cap. 5.*

[711] *Felonies enacted since the last Edition of this Book, which was in the Year 1736.*

VI. Wilfully destroying or damaging *Westminster-Bridge*.

By 9 *Geo. 2. cap. 29.* If any person or persons shall wilfully and maliciously blow up, pull down, or destroy the bridge or any part thereof, or attempt so to do, or unlawfully, without authority from the Commissioners, remove or take any works

thereto belonging, or direct or procure the same to be done, whereby the bridge or the works thereof may be damaged, or the lives of the passengers endangered, such offender or offenders being lawfully convicted, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy.

VII. Subjects inlisting, and persons procuring any subject to enlist, to go abroad and serve any foreign prince, &c.

By 9 Geo. 2. cap. 30. *sec. 1.* and 29 Geo. 2. cap. 17. *sec. 4.* If any subject shall enlist or enter himself, or shall engage to go beyond the seas, or embark with intent to enlist and enter himself, tho no enlisting money be actually paid to him; or if any person shall procure any subject to enlist or enter himself, or hire, or retain, any subject with intent to cause him to enlist or enter himself, or retain, engage, or procure any subject (tho no enlisting money be paid) to go beyond the seas, or embark with intent and in order to be enlisted to serve any foreign prince, state, or potentate, as a soldier, without his majesty's leave, he shall be guilty of felony without benefit of clergy; and offenses committed out of the realm may be tried in any county in England, by 9 Geo. 2. cap. 30. *sec. 2.*

VIII. An act for indemnifying persons who have been guilty of offenses against the laws made for securing the revenues of customs and excise, and for enforcing those laws for the future.

By 9 Geo. 2. cap. 35. *sec. 7.* Persons then liable to be transported for any of the offenses touching the said revenues mentioned in this act, committing the like offense after claiming the benefit of this act, shall be adjudged guilty of felony, and suffer death without benefit of clergy. See this statute at large, which contains many other pains and penalties concerning the revenues, and is too voluminous to be all inserted here.

IX. An act of 10 Geo. 2. cap. 32. for continuing an act for the more effectual punishing wicked and evil disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of the king's subjects, and for the more speedy bringing the offenders to justice, &c.

By 10 Geo. 2. cap. 32. and 24 Geo. 2. cap. 5. the act of 9 Geo. 1. cap. 22. called

the *Waltham Black Act*, was continued for some time; and by 31 Geo. 2. cap. 32. it was made perpetual.—And by this present *sec. 6.* if any person or persons shall wilfully and maliciously set on fire, or cause to be set on fire, any mine, pit, or delph of coal, or cannel coal, every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy. And this section the 6th is made perpetual by 31 Geo. 2. cap. 42.

By *sec. 7.* Persons convicted a second time of hunting and taking away deer out of uninclosed forests or chases, are to be transported for 7 years; and if such person or persons return from transportation within that time, to be adjudged guilty of felony, and suffer death without benefit of clergy.

By *sec. 9.* Persons armed coming into a forest, chace, or park, with an intent to steal deer, and beating and wounding the keeper or keepers, their servants or assistants, to suffer the like pains and penalties, as in *sec. 7.* and made perpetual by 31 Geo. 2. cap. 42.

X. An act of 11 Geo. 2. [713] cap. 22. for punishing such persons as shall do injuries and violences to the persons or properties of the king's subjects with intent to hinder the exportation of corn.

By *sec. 1.* Persons using violence to hinder the purchase or carriage of corn, to be imprisoned and publickly whipt.

By *sec. 2.* Persons committing the like offense a second time, or destroying granaries, or corn therein, or in ships, or vessels, shall be adjudged guilty of felony, and be transported; and if they return from transportation, to suffer death without benefit of clergy.

XI. An act of 11 Geo. 2. cap. 26. for enforcing the execution of an act of the 9th of this king, intituled an act for laying a duty upon the retailers of spirituous liquors, and for licensing the retailers thereof.

By *sec. 2.* Rescuing offenders against this act, or assaulting informers, is made felony, and transportation for seven years.

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XII. An act of 12 Geo. 2. cap.

26. for the more effectual preventing the exportation of wool from Great-Britain; and of wool and wool manufactured from Ireland to foreign parts.

By sect. 26. Persons opposing officers in the execution of their duty according to this act, are to be transported for seven years, and if they return within that time to suffer death as felons, without benefit of clergy.

deed, or any security, money, or other effects belonging to the said company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person or persons, lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or runaway with any such note, bill, dividend warrant, bond, deed, security, money, or effects, or any part of them, every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

XIII. Stealing sheep and other cattle.

By the 14 Geo. 2. cap. 6. Stealing sheep or other cattle is made felony, and the felon, his aider or abettor, to suffer death without benefit of clergy.—But it becoming doubtful to what sorts of cattle the said act was meant to extend, it is enacted by the 15 Geo. 2. cap. 84. that the said act was meant and intended, and shall be deemed and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.

XIV. Forgery, counterfeiting, or altering bank notes, &c. and servants of the bank breaking their trust to the company.

By 15 Geo. 2. cap. 13. sect. 11. If any person or persons shall forge, counterfeit, or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation, under the common seal of the said company, or any indorsement thereon, or shall offer or dispose of, or put away any such forged, counterfeit, or altered note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said company, or any their officers or servants, knowing such note, bill, dividend warrant, bond or obligation, or the indorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said company, or their successors, or any other person or persons whatsoever; every person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and [714] shall suffer death as a felon without benefit of clergy.

Sect. 12. If any officer or servant of the said company, being intrusted with any note, bill, dividend warrant, bond,

XV. For preventing cloth or woollen goods remaining on the rack or tenters, or any woollen yarn or wool left out to dry, from being stolen or taken away in the night.

By 15 Geo. 2. cap. 27. If any cloth or woollen goods on the tenters, or woollen yarn, or wool left out to dry, shall be stolen in the night, any justice, on complaint made in ten days by the owner, may issue his warrant to any peace officer in the day-time to enter into, and search the houses, out-houses, yards, gardens, or other places belonging to the houses of every person whom such owner shall, upon his oath, declare to such justice he suspecteth to have stolen, taken away, or received the same; and if the officer shall find any such goods, which from the oaths of such person he shall have reason to suspect to have been stolen, he shall apprehend the person in whose custody or possession the same shall be found, and carry him before a justice; and if he shall not give a satisfactory account how he came by the same, or in a convenient time, to be set by the justice, produce the party of whom he had the same, or a credible witness to depose on oath his property therem, he shall be convicted of stealing such goods, and shall for the first offence forfeit to the owner treble value; and in default of payment thereof in the time appointed by such justice, he shall issue his warrant to levy the same by distress and sale; and in default of distress shall commit him to the common gaol where he shall be apprehended, for three months, or till paid; for the second offence treble value, and six months imprisonment; for the third offence such justice shall commit him till the assizes; and if he shall be there convicted in like manner, he shall be guilty of felony, and transported for seven years. But persons aggrieved (except on the third conviction) may appeal to the next general quarter sessions, whose order therem shall

shall be final. But nevertheless, this shall not alter any former law in force, for stealing or receiving such cloth or goods, except where the proof is laid on the offender as aforesaid.

XVI. For preventing the counterfeiting of the current coin of this kingdom, and uttering and paying false or counterfeit coin.

By 15 Geo. 2. cap. 28. If any person shall wash, gild, or colour any lawful or counterfeit silver coin, called a shilling or sixpence, or add to or alter the impression, or any part thereof, on either side, with intent to make such shilling or sixpence [715] resemble a guinea, or half a guinea; or shall any way alter or colour halfpennies or farthings, with intent to make them resemble a shilling or sixpence, he, his counsellors, aiders and abettors, shall be guilty of high treason.

Se^t. 2. If any person shall tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence suffer six months imprisonment, and find sureties for his good behaviour for six months longer: for the second offence, shall suffer two years imprisonment, and find sureties for two years more; and for the third offence, shall be guilty of felony without benefit of clergy.

Se^t. 3. If any person shall tender in payment any counterfeit money (knowing it to be so), and shall either the same day, or within ten days after, knowingly tender other false money in payment, or at the time of such tendering have more in his custody, he shall, for the first offence, suffer a year's imprisonment, and find sureties for his good behaviour for two years more; and for the second offence, shall be guilty of felony without benefit of clergy.

Se^t. 5. Persons guilty of the said crimes shall be tried and convicted in such manner as is used against offenders for counterfeiting the coin; and the clerk of assize, or clerk of the peace where the first conviction was had, shall certify the same by a transcript in few words, containing the tenor of such conviction (for which he shall have 2*s*. 6*d*. and no more), and such certificate being produced in court, shall be sufficient proof of the former conviction. Prosecution to be in six months.

Note. By this it should seem, that the justices of the peace in sessions have power to try such offenders, otherwise this direction to the clerk of the peace to certify the conviction is incongruous; for he is not the proper person to certify what is done in another court, where he is not necessarily supposed to be present: albeit

no power is given to the sessions by any express words in this statute to hear and determine such offenses.

XVII. For the more easy conviction of offenders found at large in Great Britain, after they have been ordered for transportation.

By 16 Geo. 2. cap. 15. If any felon or other offender, ordered for transportation, or having agreed to transport himself on certain conditions, either for life or any number of years, shall be afterwards at large in any part of Great Britain, without some lawful cause, before the expiration of the term, he shall be guilty of felony without benefit of clergy. And by Se^t. 2. of 16 Geo. 2. cap. 15, the manner of trying convicts returning from transportation is to be according to 6 Geo. 1. cap. 23.

XVIII. For punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody.

By 16 Geo. 2. cap. 31. If any person shall assist any prisoner to attempt his escape from any gaol, tho' no escape be actually made, if such prisoner was then attainted, or convicted of treason or felony (except petty larceny), or lawfully committed or detained in any goal for treason or felony (except petty larceny) expressed in the warrant of commitment; he shall be guilty of felony, and be transported for seven years; and if such prisoner was then convicted of, or detained in gaol for petty larceny, or any [716] other crime not being treason or felony expressed in the warrant of commitment, or was then in goal for debt amounting to 10*l*. he shall be guilty of a misdemeanour, and be liable to fine and imprisonment.

And if any person shall convey, or cause to be conveyed, any disguise, instrument or arms, to any prisoner in gaol, or to any other person there for his use, without consent of the keeper; such person, altho' no escape or attempt be actually made, shall be deemed to have delivered such disguise, instrument, or arms, with an intent to assist such prisoner to escape, or attempt to escape; and, if such prisoner was then attainted or convicted of treason or felony (except petty larceny), or lawfully detained in goal for treason or felony (except petty larceny) expressed in the warrant of commitment,—he shall be guilty of felony, and transported for seven years;—but if the prisoner was then convicted or detained for petty larceny, or any

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any other crime not being treason or felony, expressed in the warrant of commitment, or for debt amounting to 100*l.* he shall be guilty of a misdemeanour, and liable to fine and imprisonment.

And if any person shall assist any prisoner to attempt to escape from any constable, or other person who shall have the lawful charge of him in order to carry him to gaol, by virtue of a warrant of commitment for treason or felony (except petty larceny); or if any person shall assist any felon to attempt to escape from on board any boat or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, or his agents, he shall be guilty of felony, and be transported for seven years.—All prosecutions on this act to be commenced within a year after the offence committed.

XIX. Holding correspondence with the sons of the pretender.

By 17 Geo. 2. cap. 39. Holding correspondence in any manner with any of the pretender's sons, or with any person employed by them, or remitting any money for their, or any of their use, knowing the laid money to be for such use or service, such person so offending shall be guilty of high treason, and shall suffer and forfeit *£*as in cases of high treason. And any of the pretender's sons attempting to land in Great Britain or Ireland, to stand and be adjudged to be attainted of high treason.

XX. Stealing of linen, fustian, and cotton goods and wares, in buildings, fields, grounds, and other places used for printing, whitening, bleaching, or drying the same

By 18 Geo. 2. cap. 27. Every person who shall by day or night feloniously steal any linen, fustian, calico, or cotton cloth, or cloth worked, woven, or made of any cotton or linen yarn mixed; or any thread, linen, or cotton yarn; linen or cotton tape, incle, filleting, laces, or any other linen, fustian, or cotton goods, laid to be printed, whitened, bowked, bleached, or dried, to the value of ten shillings, or shall knowingly buy or receive any such wares stolen, or who shall assist, aid, or hire another to commit such offence, shall be guilty of felony without benefit of clergy.—The court may order such offenders to be transported for fourteen years.—And such offenders breaking gaol, or returning from transportation, to suffer death without benefit of clergy.

XXI. An act to indemnify persons who have [717] been guilty of the unlawful importing, landing, or running of prohibited, uncustomed, or other goods and merchandize.

By 18 Geo. 2. cap. 28. Offenders guilty of the offences against the revenue mentioned in this act, and liable to be transported for the same before this act was made, and taking the benefit of the indemnification therein, and afterwards repeating such offences, shall be guilty of felony, and suffer death without benefit of clergy.

XXII. Riotous exportation of wool, and other goods prohibited to be exported.

By 19 Geo. 2. cap. 34. which by the 15 Geo. 3. cap. 51. hath continuance to Sept. 29, 1778, &c. If any persons armed, to the number of three or more, shall be assembled to assist in the illegal exportation of wool, or other goods prohibited to be exported, or in carrying of wool, or other such goods, in order to exportation; or in rescuing the same after seizure; or in preventing his being apprehended; or shall be aiding in any of the premises; or if any person shall have his face disguised when passing with such goods; or shall forcibly hinder or assault any officer in seizing the same, or dangerously wound any such, in attempting to go on board any vessel; or shoot at, or wound him when on board in execution of his office, he shall be guilty of felony without benefit of clergy.—There are several other felonies in this act against smugglers, too long to be inserted here; see the act, which is very long.

XXIII. To prevent the return of such rebels concerned in rebellion in 1745, as were or should be pardoned on condition of transportation; and to hinder their going into the enemy's country.

By 20 Geo. 2. cap. 46. Rebels returning from transportation without licence, or voluntarily going into France or Spain to suffer death without benefit of clergy; and aiders of such persons returning, to suffer death without benefit of clergy.—And subjects holding correspondence with rebels going into France or Spain, or persons employed by them, to suffer death without benefit of clergy.

XXIV.

XXIV. Quakers oaths.

By 27 Geo. 2. cap. 46. sec. 36. In all cases wherein by any act of parliament an oath shall be allowed or required, the solemn affirmation of Quakers shall be allowed instead of such oath, and that altho' no express provision be made for that purpose in such act; and if any person shall be lawfully convicted of wilful, false, and corrupt affirming, or declaring any matter or thing, which, if sworn in the usual form, would have amounted to wilful and corrupt perjury, he shall suffer as in cases of perjury.

XXV. For preventing robberies and thefts upon any navigable rivers, ports of entry or discharge, wharfs and keys adjacent.

By the 24. Geo. 2. cap. 45: All persons who shall feloniously steal any goods of the value of 40 shillings in any ship, boat, or vessel, on any navigable river, or in any port of entry or discharge, or from any [718] wharf or key, or shall be present and aiding therein, shall be excluded from the benefit of clergy.

XXVI. For securing mines of black lead from theft and robbery.

By 25 Geo. 2. cap. 10. Every person who shall unlawfully break, or by force enter into, any mine or wad-hole of wad, or black cawke, commonly called black lead; or into any pit, shaft, or vein thereof; or shall unlawfully take and carry away from thence any wad, black cawke, or black lead; or shall aid, hire or command any person to commit any the said offences, shall be guilty of felony, and the court or judge may order him to be committed to prison, or the house of correction not exceeding one year, to be kept to hard labour, and to be publicly whipt by the common hangman, or by the master of such house of correction, at the times and places, and in such manner as the court shall think proper; or he may be transported for a term not exceeding seven years; and if he shall voluntarily escape, or break prison, or return from transportation before the time, he shall be guilty of felony without benefit of clergy; and if any person shall buy or receive any such wad, knowing the same to be unlawfully taken and carried away as aforesaid, he shall be guilty of felony, and be liable to all the penalties inflicted by the laws on persons knowingly buying or receiving stolen goods.

XXVII. For better preventing the horrid crime of murder

By 25 Geo. 2. cap. 37. sec. 9. If any person, shall, by force, set at liberty or rescue, or attempt to set at liberty or rescue any person out of prison, committed for, or found guilty of murder; or rescue, or attempt to rescue any such person going to, or during execution; he shall be guilty of felony without benefit of clergy.—And by sec. 10. If, after execution, any person shall by force rescue, or attempt to rescue the body, he shall be guilty of felony, and transported for seven years.

XXVIII. For enforcing the laws against persons who shall steal, or detain ship-wrecked goods, &c.

By 26 Geo. 2. cap. 19. Persons convicted of plundering, stealing, taking away or destroying any goods or merchandizes, &c. ship-wrecked, or of obstructing the escape of any person from a wreck, or of putting out false lights, shall be deemed guilty of felony without benefit of clergy.—sec. 2. Provided, where goods of small value shall be stolen without any circumstances of cruelty, the offender may be indicted for petit larceny, and shall suffer such punishment as the laws, in cases of petit larceny, do enjoin or require.

XXIX. For the better preventing clandestine marriages.

By 26 Geo. 2. cap. 33. sec. 8 & 9. If any person shall solemnize matrimony in any other place than a church, or public chapel, (unless by special licence from the *Archbishop of Canterbury*) or without publication of banns, or licence in a church or chapel; he shall (on prosecution in three years) be adjudged guilty of felony, and transported for fourteen years; and the marriage shall be void.—But by sec. 18. not to extend to *Scotland*, [719] nor to the marriages of Quakers, or Jews.

By sec. 16. If any person shall knowingly and wilfully insert, or cause to be inserted in the register book, any false entry, or any matter or thing relating to any marriage, or falsely make, alter, forge, or counterfeit any such entry in the register or any marriage licence, or cause the same to be done, or affix thereunto, or utter as true any such falsified register, or copy thereof, or any such forged licence, he shall be guilty of felony without benefit of clergy.

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XXX. Threatening letters.

By 27 Geo. 2. cap. 15. If any person shall knowingly send any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money or other valuable thing; or threatening to kill or murder any of his Majesty's subjects, or to burn their out-houses, barns, stacks of corn or grain, hay or straw; though no money, or venison, or other valuable thing be demanded by such letter; or shall rescue any person in custody for such offence, he shall be guilty of felony without benefit of clergy.

XXXI. For preventing the stealing, buying and receiving stolen lead, iron, copper, brass, bell-metal and solder.

By 29 Geo. 2. cap. 30. Every person who shall buy or receive any of the said materials, knowing the same to be unlawfully come by, or shall privately buy or receive any of the said materials (stolen) by suffering any door, window, or shutter, to be left opened and unfastened, between sun-setting and sun-rising, for that purpose; or shall buy or receive the same, or any of them, at any time, in any clandestine manner, from any person or persons whatsoever, shall, being convicted thereof by due course of law, although the principal felon or felons has not nor have been convicted of stealing the same, be transported for fourteen years.

XXXII. For punishment of persons who shall attain, or attempt to attain, possession of goods or money by false or untrue pretences.

By 30 Geo. 2. cap. 24. All persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person money, goods, wares or merchandizes, with intent to cheat or defraud any person of the same; or shall knowingly send or deliver any letter or writing with, or without a name subscribed thereto, or signed with a fictitious name, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with intent to extort from him any money, or other goods, shall be deemed offenders against law and the public peace; and the court, before whom any such offender shall be tried, shall, on conviction, order him to be fined and imprisoned, or to be put in the pillory, or publicly whipped, or to be transported for seven years.

XXXIII. For preventing frauds and abuses attending payments of seamen's wages, &c.

By 31 Geo. 2. cap. 10. Whoever willingly and knowingly shall personate or falsely assume, or procure any other to personate or falsely assume, the name or character of any officer, seaman, [720] or other person intitled, or supposed to be intitled to any wages, pay, or other allowances of money, or prize-money, for the service done on board of any of his Majesty's ships or vessels; or willingly or knowingly shall personate or falsely assume the name or character of the executor or administrator, wife, relative, or creditor of any such officer, or seaman, or other person, in order to receive any wages, pay, or other allowances of money, or prize-money as aforesaid, or shall forge or counterfeit, or procure to be forged, or counterfeited (or utter or publish a true, knowing the same to be false, forged or counterfeited, 9 Geo. 3. cap. 30. sec. 6.) any letter of attorney, bill, ticket, certificate, assignment, last will, or my other power of authority, in order to receive any such wages, pay, or other allowances of money, or prize-money as aforesaid; or shall willingly and knowingly take a false oath, or procure any other person to take a false oath to obtain the probate of any will, or letter of administration, in order to receive the payment of any wages, pay, or other allowances of money, or prize-money due, or that were supposed to be due to any such officer, seaman, or other persons as aforesaid, who has really served, or was supposed to have served on board of any of his Majesty's ships or vessels; every such person so offending shall be guilty of felony without benefit of clergy.

XXXIV. For preventing frauds and abuses in marking or stamping gold or silver plate.

By 31 Geo. 2. cap. 32. sec. 15. If any person shall cast, forge, or counterfeit, or cause or procure to be cast, forged or counterfeited, the mark or stamp used for making plate in pursuance of the act of 12 Geo. 2. cap. 26 &c. by the goldsmiths' company, &c. or mark plates, &c. with a forged or counterfeit mark or stamp, or shall transpose the mark impressed from one piece of wrought plate to another; or shall sell or export plate with a forged, counterfeit, or transposed mark, or shall wilfully and knowingly have any such mark or stamp in his possession; he shall be guilty of felony without benefit of clergy. But this is repealed, and made transportation for fourteen years by 13 Geo. 3. cap. 30.

FALOSIA.

FELONIES enacted in the Time of King GEORGE III.

I. To prevent the committing of thefts and frauds by persons navigating burn-boats, and other boats upon the river *Thames*.

By 2 Geo. 3 cap. 28. Persons convicted of knowingly buying, or receiving stolen goods from vessels in the river *Thames*, or of privately buying or receiving, at any time, any such goods clandestinely, or by suffering any door, window, or shutter at night, to be left open or unfastened for that purpose, shall be transported for fourteen years; and persons convicted of cutting or spoiling any cordage, cables, buoys, buoy-rope, headstall, or other faths, or [721] ropes of vessels at anchor or moorings in the river; and persons who shall be aiding or assisting therein, with an intent to steal the same, shall be transported for seven years.

II. For preventing frauds in relation to the postage of letters.

By 4 Geo. 3. cap. 24. sct. 8. If any person shall counterfeit the hand-writing of any person whatsoever in the supercription of any letter, or packet, to be sent by the post, in order to avoid payment of the duty of postage; every person so offending shall be deemed guilty of felony, and shall be transported for seven years.

III. For establishing a manufactory of cambricks and lawns, &c.

By 5 Geo. 3. cap. 37. sct. 15. If any person shall counterfeit the common seal of the corporation, established by this act, or shall forge, counterfeit, or alter any deed, bill, bond, or obligation under the common seal of the said corporation, or shall offer to dispose of, or pay away any such forged, counterfeited, or altered bill, bond, or obligation, knowing the same to be such; or shall demand any moncy therein mentioned, or pretended to be due thereon, or on any part thereof, of and from the said corporation, or any members officers, or servants thereof, knowing such bill, bond, or obligation to be forged, counterfeited or altered, with intent to defraud the same corporation, or their successors, or any other person or persons whomsoever, every person so offending, and being convicted thereof, shall be judged guilty of felony, and shall suffer as in cases of felony, without benefit of clergy.

And by sct. 16. If any person shall, by day or night, break into any house,

shop, cellar, vault, or other place or building, or by force enter into any house, shop, cellar, or vault, or other place or building with intent to steal, cut, or destroy any linen yarn belonging to any linen manufactory, or the looms, tools, or implements used therein; or shall wilfully or maliciously cut in pieces or destroy any such goods, when exposed either to bleach or dry, he shall be guilty of felony without benefit of clergy.

IV. For preservation of fish in fish-ponds, and conies in warrens, &c.

By 5 Geo. 3. cap. 14. sct. 1. In case any person or persons shall enter into any park or paddock fenced in and inclosed, or into any garden, orchard, or yard adjoining, or belonging to any dwelling-house, in or through which park or other premises any river or stream shall run or be, or wherein shall be any river, stream, pond, pool, moat, stew, or other water, and by any ways or means, or device whatsoever, shall steal, take, kill, or destroy any fish, bred, kept, or preferred, in any such river or stream, pond, pool, moat, stew, or other water aforesaid, without the consent of the owner or owners thereof; or shall be aiding and assisting in stealing, taking, killing, or destroying any such fish as aforesaid; or shall receive or buy any such fish, knowing the same to be so stolen or taken as aforesaid; and being therof indicted within six calendar months next after such offense or offenses shall have been committed, before any judge or justices [722] of gaol-delivery for the county wherein such park or paddock, garden, orchard, or yard shall be, and shall on such indictment be by verdict, or his or their own confession or confessions, convicted of any such offense or offenses as aforesaid; the person or persons so convicted shall be transported for seven years.

And by sct. 6. If any person or persons shall wilfully and wrongfully, in the night-time, enter into any warren or ground, lawfully used or kept for the breeding or keeping of conies, altho the same be not inclosed, and shall then and there wilfully and wrongfully take or kill, in the night-time, any coney or conies, against the will of the owner or occupier thereof, or shall be aiding and assisting therein, and shall be convicted of the same before any of his majesty's justices of eyre and terminer or gaol-delivery, for the county whereof such offense or offenses shall be committed, every such person and persons so offending, and being thereof

S 8 lawfully

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lawfully convicted in manner aforesaid shall and may be transported for seven years, or suffer such other punishment, by whipping, fine, or imprisonment, as the court, before whom such person or persons shall be tried, shall in their discretion award and direct.

By *scrl. 7.* No person who shall be convicted of any offence against this act, shall be liable to be convicted for any such offence under any former act or acts, law or laws, now in force.

V. For preventing unlawful combinations of workmen employed in the silk manufacture.

By *6 Geo. 3. cap. 28. scrl. 15.* If any person or persons shall, by day or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture, in the loom, or any warp, or shute, tools, tackle, or utensils; or shall wilfully and maliciously cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom, or any warp or shute, tools, tackle, or utensils, prepared or employed in, or for the making thereof; or shall wilfully and maliciously break or destroy any tools, tackle, or utensils, used in or for the weaving or making any such velvet, wrought silks, or silks mixed with any other materials, or other silk goods, or silk manufactures, not having the consent of the owners so to do; every such offender, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy.

VI. For the encouraging the cultivation, and for the better preservation of trees, roots, plants, and shrubs.

By *6 Geo. 3. cap. 36.* All and every person and persons who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away any oak, beech, ash, elm, fir, chestnut, or any timber-tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained; or shall, in the night-time, pluck up, dig up, break, [723] spoil, or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants of the value of five shillings, and which shall be growing, standing, or being in the garden, or under nursery-ground, or other inclosed ground, of any person or persons whomsoever, shall be deemed and

construed to be guilty of felony; and every such person or persons shall be subject and liable to the like pains and penalties as a felonies of felony; and the court by and before whom such person or persons shall be tried, shall, and hereby have authority to transport such person or persons for the space of seven years: and all and every person and persons who shall be will be aiding, abetting, or assisting in such cutting down, breaking, throwing down, barking, burning, or otherwise spoiling, destroying, or carrying away any such oak, beech, ash, elm, fir, chestnut, or any timber-tree, or other tree or trees standing for timber, or likely to become timber, as aforesaid; or in such plucking up, digging up, cutting, breaking, spoiling, or destroying, or carrying away such root, shrub or plant, roots, shrubs or plants as aforesaid, of the value aforesaid; or who shall buy or receive such root, shrub or plant, roots, shrubs or plants, of the value aforesaid, knowing the same to be stolen, shall be subject and liable to the same punishment, as if he, she, or they had stolen the same; any law to the contrary notwithstanding.

VII. For the better preservation of timber-trees, and of woods and under-woods; and for the further preservation of roots, shrubs, and plants.

By *6 Geo. 3. cap. 48.* Every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil, or destroy, or carry away any timber-tree or trees, or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner (or of any of his majesty's forests or chases, without the consent of the surveyor, or his deputy, or persons intrusted with the care thereof), and shall be thereof convicted at the oath of one witness, before one justice, shall, for the first offence, forfeit not exceeding 20*l.* together with the charges previous to and attending such conviction, to be ascertained by such justice; and on non-payment thereof, to be committed by such justice to the common gaol, for any time not exceeding twelve months, nor less than six, or until the penalty and charges shall be paid: for the second offence, to forfeit not exceeding 30*l.* together with the charges as aforesaid; and for non-payment, to be committed as aforesaid, for any time not exceeding eighteen months, nor less than twelve, or until the penalty and charges shall be paid; and if any person shall be guilty of a like offence a third time, and shall thereof be committed

in like manner^{*}, he shall be deemed guilty of felony, and the court before whom he shall be tried, shall have authority to transport him for seven years. And all oak, beech, chefnut, walnut, ash, elm, cedar, fir, sfp, lime, sycamore, and birch trees, [and also poplar, elder, larch, maple, and hornbeam, by 13 Geo. 3. cap. 33.] shall be deemed timber trees.

And by *act. 3.* Every person who shall pluck up, spoil or destroy, or take or carry away any root, shrub or plant, roots, shrubs or plants, out of the fields, nurseries, gardens, or garden-ground, or other cultivated lands, of any person, without the consent of the owner, and shall be thereof convicted upon the oath of *one witness, before one justice*, shall, for the first offence, forfeit not exceeding 40s. together with the charges previous to, and attending such conviction, to be ascertained by such justice; and if not paid immediately, the said justice shall commit him to the house of correction for one month, to be kept to hard labour, and once whipped there: for the second offence, shall forfeit not exceeding 5l. together with the charges as aforesaid; and if not paid immediately, then to be committed to the house of correction for three months, and to be kept to hard labour, and whipped there once in every of the said months: and if any person shall a third time commit the like offence, and shall be thereof convicted, he shall be deemed guilty of felony, and the court before whom he shall be tried, shall have authority to transport him for seven years.

VIII. Stealing bills or other securities for money out of letters.

By 7 Geo. 3. cap. 50. *act. 1.* If any person employed in the business of the post-office, shall secrete, imbezzle, or destroy any letter or packet, containing any bank note, bank post bill, bill of exchange, exchequer bill, South-Sea or East India bond, dividend warrant of the bank, or other company, navy, or victualling, or transport bill, ordnance debenture, scaman's ticket, state lottery ticket, bank receipt for payment on any loan, note or assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or

for selling stock in the funds, or belonging to any company, American provincial bill of credit, goldsmith's or banker's note for payment of money, or other bond or warrant, draught, bill, or promissory note for payment of money, or shall steal and take the same out of any letter or packet, he shall be guilty of felony, and suffer death without benefit of clergy. [And see for the like the *act of 5 Geo. 3. cap. 25. sect. 17.*]

By *act. 2.* If any person shall rob any mail of any letter, packet or bag, or shall steal and take any letter or packet from out of any mail or bag or out of any post-office, or house, or place, for the receipt or delivery of letters, altho the same shall not appear to be a taking from the person, or on the highway, or in a dwelling-house, or out-house belonging to a dwelling-house; and altho it shall not appear that any person was put in fear, he shall nevertheless be guilty of felony, [725] and shall suffer death without benefit of clergy.

By *act. 3.* If any person employed in any business of the post-office, who shall take any letter or packet to be forwarded by the post, and receive any money therewith for the postage, shall burn or destroy any such letter or packet; or shall advance the rate of postage upon any letter or packet, and not duly account for the money by him received for such advanced postage, he shall be deemed guilty of felony.

IX. For the more speedy and effectual transportation of offenders.

By 8 Geo. 3. cap. 15. Where his Majesty's mercy shall be extended to any offender upon condition of transportation, and the same be signified to the judge, by one of the principal secretaries of state, such judge may make order for the immediate transportation of such offender; who shall thereupon be transferred and made over to the contractor, &c. and if such offender be afterwards seen at large in Great Britain, without lawful cause, before the expiration of the term for which he was transported, he shall suffer death without benefit of clergy.

* Here seems to be a mistake. Being convicted *in like manner*, implies a summary conviction, as before directed, before one justice; but it cannot be intended, that a justice shall, in this manner, have power to transport a man. But the word *court* afterwards, before which he shall be convicted (that is court of *assize*, or *sessions*, as it seemeth by the following words of the act), implies a legal trial by a jury; and therefore these words [*in like manner*] ought to be omitted.

+ The words in the printed act are [and shall be thereof convicted upon the oath of one or more credible witness or witnesses, before any one or more justice or justices of the peace]. It is probable by mistake of the printer of this act.

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X. For punishment of persons destroying mills, mines, &c.

By 9 Geo. 3. cap. 29. sect. 1. If any person or persons riotously and tumultuously assembled, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down any wind saw-mill, or other wind-mill, or any water-mill, or other mill, or any of the works thereto belonging, every such person shall be guilty of felony without benefit of clergy.

And by *sect. 2.* If any person shall wilfully or maliciously burn, or set fire to any such mill; he shall in like manner be guilty of felony without benefit of clergy.

And by *sect. 3.* If any person shall wilfully or maliciously set fire to, burn, demolish, pull down, or otherwise destroy or damage any fire engine, or other engine erected for draining water from collieries, or coal-mines, or for drawing coals out of the same; or for draining water from any mine of lead, tin, copper, or other mineral; or any bridge, waggon-way or trunk, erected for conveying coals from any colliery or coal-mine, or slaithe for depositing the same; or any bridge or waggon-way erected for conveying lead, tin, copper, or other mineral from any such mine, or shall cause or procure the same to be done, he shall be guilty of felony, and transported for seven years.

XI. Forgery in relation to seamen's wages.

By 9 Geo. 3. cap. 30. *sect. 6.* If any person shall utter or publish as true, any false, forged or counterfeited letter of attorney, bill, ticket, certificate, assignment, last will, or any other power or authority whatsoever, in order to receive any wages, pay, or other allowances of money; or prize-money, due, or supposed to be due to any officer or seaman, or other person, who has really served, or was supposed to have served, or who shall hereafter serve, or be supposed to have served, on board of any ship or vessel of his Majesty, his heirs or successors, with intent to defraud any person, knowing the same to be false, forged or counterfeited; then every such person, being thereof lawfully convicted, [726] shall be deemed guilty of felony, and shall suffer death without benefit of clergy.

XII. For making the receiving of stolen jewels, and gold and silver plate, in the case of burglary and highway robbery, more penal.

By 10 Geo. 3. cap. 48. Every person who shall buy or receive any stolen jewel or jewels, or any stolen gold or silver plate, watch or watches, knowing the same to have been stolen, shall, in all cases where such jewel or jewels, or gold or silver plate shall have been feloniously stolen, accompanied with a burglary actually committed in the stealing the same, or shall have been feloniously taken by a robbery on the highway, shall be triable as well before conviction of the principal felon in such felony and burglary or robbery, whether he shall be in or out of custody, as after his conviction: And if any person so buying or receiving such jewel or jewels, or gold or silver plate, shall be convicted thereof, he shall be guilty of felony, and transported for fourteen years.

XIII. For preventing the counterfeiting the copper-coin of this realm.

By 11 Geo. 3. cap. 49. *sect. 1.* If any person or persons shall make, coin or counterfeit, any of the copper monies of this realm, commonly called an *half-penny*, or a *farthing*, such person or persons offending therein, and his, her, or their counsellors, aids, or abettors and procurers, shall be adjudged guilty of felony [but within clergy.]

By *sect. 2.* If any person or persons shall buy, sell, take, receive, pay, or put off any counterfeit copper money, not melted down, or cut in pieces, at, or for a less rate or value than the same, by its denomination, doth or shall import, or was counterfeited for, every such person and persons shall be adjudged guilty of felony [but within clergy].

XIV. For proceeding against persons standing mute on their arraignment for felony or piracy.

By 12 Geo. 3. cap. 20. If any person being arraigned on any indictment or appeal for felony, or on any indictment for piracy, shall, upon such arraignment stand mute, or will not answer directly to the felony or piracy, such person so standing mute, as aforesaid, shall be convicted of the felony or piracy charged in such indictment or appeal; and the court, before whom he shall be arraigned, shall thereupon award judgment and execution against such person, in the same manner as if such person had been convicted by verdict, or confession of the felony, or piracy charged in such indictment or appeal; and such judgment shall have all the same consequences in every respect, as if such person had

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had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.

XV. For preserving his Majesty's dock-yards, magazines, ships, ammunition, and stores.

By 12 Geo. 3. cap. 24. If any person shall, either within this realm, or any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, any of his Majesty's ships or vessels of war, whether the same be on float, or building in any of his Majesty's dock-yards, or [727] building, or repairing by contract any private yard; or any of his Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out of ships or vessels; or any of his Majesty's military, naval, or victualling stores, or other ammunition of war; or any place where any such military, naval, or victualling stores, or other ammunition of war shall be kept; he, and also his aiders and abettors, shall be guilty of felony, without benefit of clergy.

XVI. For the preventing of frauds in the stamp duties upon vellum, parchment, paper and cards.

By 12 Geo. 3. cap. 48. If any person shall write or engrave, or cause to be written or engrossed, either the whole, or any part of any writ, mandate, bond, affidavit, or other writing, matter, or thing whatsoever, in respect whereof any duty is, or shall be payable by any act or acts made, or to be made in that behalf, on the whole, or any part of any piece of vellum, parchment or paper, whereon there shall have been before written any other writ, bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable, as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped according to the said acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing, written in such writ, mandate, affidavit, bond, or other writing, matter or thing, as aforesaid; or fraudulently cut, tear, or get off, any mark or stamp, in respect whereof or whereby, any duties are or shall be payable, or, denoted to be paid or payable as aforesaid, from any piece of vellum, parchment, paper, playing cards, out-

side paper of any parcel or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter or thing, in respect whereof any duty is, or shall be payable, or denoted to be paid or payable, as aforesaid, then, and so often, and in every such case, every person so offending in any of the particulars before mentioned, and every person knowingly and wilfully aiding, abetting or assisting any person or persons, to commit any such offense or offenses, as aforesaid, shall be deemed guilty of felony, and shall be transported for a term not exceeding seven years; and if such offender shall voluntarily escape, or break prison, or return from transportation within the limited time, he shall suffer death without benefit of clergy.

XVII. For the more effectual execution of criminal laws in the two parts of the united kingdom.

By 13 Geo. 3. cap. 31. sec. 4. If any person having feloniously taken money, cattle, goods, or other effects, in either part of the united kingdom, and shall afterwards have the same, or any part thereof, in his possession in the other part of the united kingdom; it shall be lawful to indict, try and punish him for theft or larceny, in that part of the united kingdom where he shall so have such money, cattle, goods or other effects in his possession, as if the same had been stolen there.

And by sect. 5. If any person, in either part of the united kingdom, shall [728] knowingly receive or have any money, cattle, goods, or other effects, stolen, or otherwise feloniously taken in the other part of the united kingdom, he shall be liable to be indicted, tried, and punished for the same, in that part of the united kingdom where he shall so receive and have the same, as if they had been originally stolen there.

XVIII. For preventing the forging or counterfeiting any stamp or seal used for marking calicoes, linens and stuffs to be printed, painted, stained or dyed.

By 13 Geo. 3. cap. 56. If any person shall counterfeit or forge any stamp or seal already provided by the commissioners in the said act mentioned, or which shall hereafter be provided, renewed, or altered; or shall counterfeit, or resemble the impression of the same, upon any of the said commodities chargeable with duties, thereby to defraud his Majesty thereof, such person shall be guilty of felony without benefit of clergy.

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XIX. For preventing the forging of the notes or bills of the *Bank of England, &c.*

By 13 Geo. 3. cap. 79. sec. 1. If any person or persons (other than the officers, workmen, servants, or agents for the time being of the governor, &c. of the bank, to be authorised for that purpose by them, and for their use) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using, or (without being authorised as aforesaid) shall knowingly have in his, her, or their custody or possession (without lawful excuse, the proof whereof shall lie upon the person accused) any frame, mould, or instrument for the making of paper, with the words *Bank of England*, visible in the substance of such paper; or shall make, or cause or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the said words, *Bank of England*, shall be visible; or if any person (except as before excepted) shall by any art, mystery, or contrivance, cause or procure the said words, *Bank of England*, to appear visible in the substance of any paper whatsoever; or knowingly aid or assist in causing the said words, *Bank of England*, to appear in the substance of any paper whatsoever; every person so offending in any of the cases aforesaid, shall, for such offence, be deemed a felon, and shall suffer death without benefit of clergy*.

XX. To prevent the stealing of deer.

By 16 Geo. 3. cap. 30. sec. 1. The penalty on persons who shall hunt, kill, wound or shoot at, &c. any fallow-deer in any forest, park, &c. without being duly authorised, is, for the second offence, felony and transportation for seven years.

And by s^t. 9. The penalty on persons carrying fire arms into any forest, park, &c. with intent to destroy deer, is also felony, and transportation for seven years.

XXI. To authorize, for a limited time, the punishment by hard labour of offenders, who, for certain crimes, are, or shall become liable to be transported.

By 16 Geo. 3. cap. 43. s^t. 1. Any male person convicted in *England* of any crime punishable by transportation, may, instead thereof, be kept to hard labour in [729] cleansing the river *Thames*, &c. for any term not less than three, nor more than ten years.

And by s^t. 15. If any person so ordered to hard labour, shall at any time during the term, for which he shall be ordered to hard labour, break prison, or escape; for the first escape, he shall be punished by doubling the term of the service and hard labour; and on conviction for a second escape, he shall be adjudged a felon, and suffer death without benefit of clergy†.

* By 13 Geo. 3. ch. 84. § 42, the malicious destruction of turnpike-gates, houses, or engines, &c. is a felonious and transportable offence: (and so as to rescuers, &c.) *Vide* indictment hereon, and said § of *fine* at large. Cr. Cir. Com. 7th edit. 740-1.

† By 16 Geo. 3. ch. 34. § 15. If any person shall counterfeit, &c. or utter, sell, &c. knowing, &c. any seal, stamp, or mark, used for indentures, leases, bonds, or other deeds, cards, dice, or newspapers, he shall be adjudged a felon, and suffer death, without benefit of clergy. *Vide* also abstract of 29 Geo. 3. ch. 50. § 13. being No. LXI, p^t.

Statutes relating to FELONY enacted since the last Edition of this Work, which was in the Year 1778.

XXII. For granting to his *Majesty* certain duties on licences, to be taken out by all persons acting as auctioneers, and certain rates and duties on all lands, houses, goods, and other things, sold by *auction*; (*a*) and upon indentures, leases, bonds, deeds, and other instruments.

(*a*) Partly repealed as to *auditors*, by 19 Geo. 3. ch. 56. § 1.

lately

By 17 Geo. 3. ch. 50. § 25. If any person shall counterfeit or forge, or procure to be counterfeited or forged, any seal, stamp, or mark, to resemble any seal, stamp, or mark, directed, or allowed to be used by this or any other act of parliament, for the purpose of denoting the duties by this or any other act of parliament granted, or shall counterfeit or resemble the impression of the same with an intent to defraud his *Majesty*, his heirs and successors, of any of the said duties; or shall privately or fraudu-

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lently use any seal, stamp, or mark, directed or allowed to be used by this or any other act of parliament, relating to the stamp-duties, with intent to defraud his *Majesty*, his heirs and successors of any of the said duties; every person so offending, and being thereof lawfully convicted, shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XXIII. For preventing the forging of acceptances of bills of exchange, &c. with intent to defraud corporations. *Vide stat. 7 Geo. 2. ch. 22.*

By 18 Geo. 3. cb. 18. If any person shall falsely make, alter, forge, or counterfeit, or cause or procure, &c. or willingly act, &c. any acceptance of any bill of exchange, or the number, or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intention to defraud any corporation whatsoever; or shall utter, &c. with like intention, he shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy.

XXIV. For the payment of costs to parties on complaints determined before *Judges* of the peace, out of sessions; for the payment of the charges of Constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny, or other felony.

By 18 Geo. 3. cb. 19. § 7. On trials for grand or petit larceny, or other felony, the court may order the treasurer of the county, &c. to pay the prosecutor his reasonable expenses, and also an allowance for his trouble and loss of time, if he shall appear to the court to be in poor circumstances. And also by the same statute, § 8. the court may order the payment of the reasonable expenses of persons appearing on their recognizances, or subpoenas, to give evidence, whether any bill of indictment be preferred or not to the grand jury, and also reasonable allowances for their trouble and loss

(b) These expenses extend to inferior districts having jurisdiction to try felons, and raising their own rates similar to the county rates. *Rex v. Myers*, 6 T. R. 237.

(c) *Vide Stat. 4 Geo. 1. ch. 11; 6 Geo. 1. ch. 23.*

* Repealed as to receipts for legacies, and new duties granted, by 36 Geo. 3. cb. 52. abrogated post.

of time, if they shall appear to the court to be in poor circumstances (b).

Vide stat. 25 Geo. 2. cb. 36. § 11. and 27 Geo. 2. ch. 3. § 3. cited in 6 T. R. 238, Easter Term, 35 Geo. 3. K. B.

XXV. For granting to his *Majesty* several additional duties on stamped vellum, parchment, and paper: and for better securing the stamp duties upon indentures, leases, deeds, and other instruments.

By 19 Geo. 3. cb. 66. § 8. If any person shall counterfeit or forge, or procure to be counterfeited or forged, any seal, stamp, or mark, directed or allowed to be used by this or any other act of parliament, for the purpose of denoting the duties by this or any other act of parliament granted, or shall counterfeit or resemble the impression of the same, with an intent, &c. or shall privately or fraudulently use, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XXVI. To explain and amend the laws relating to the *Transportation*, imprisonment, and other punishment of certain offenders.

Vide No. XL. post.

By 19 Geo. 3. cb. 74. § 3. When any person is convicted of felony for which he shall be liable to be burnt in the *band* (c), the court may, instead thereof, impose on him a moderate fine, or (except in the case of manslaughter) order him to be either publicly or privately whipped. But by § 4. this act shall not abridge the power vested in the court of imprisoning offenders.

XXVII. For granting to his *Majesty* several additional duties on advertisements; and certain duties on receipts for legacies, or for any share of a personal estate divided by force of the statute of distributions, or the custom of any province or place*.

By 30 Geo. 3. cb. 28. § 6. If any person shall counterfeit or forge, or procure, &c. any seal, stamp, or mark, directed or allowed to be used by this act, or shall coun-

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terfeit or resemble the impression of the same, with intent, &c. or shall privately or fraudulently use, &c. he shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXVIII. For granting to his *Majesty* an additional duty upon almanacks printed on one side of any one sheet or piece of paper, &c.

By 21 *Geo. 3. ch. 56. § 9.* If any person shall counterfeite, or forge, or procure to be counterfeited or forged, any stamp or mark, to resemble any stamp or mark, directed to be used by this or any other act of parliament; or shall counterfeit or resemble the impression of the same; or shall utter, &c. or shall privately or fraudulently use, &c. with intent to defraud, &c. he shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXIX. To explain and amend an act, made in the fourth year of the reign of his late *Majesty King George the Second*, intituled, An act for the more effectual punishing stealers of lead, and iron burs, fixed to houses (*d*), or any fences belonging thereto.

By 21 *Geo. 3. ch. 68.* All and every person and persons who shall steal, rip, cut, break, or remove with intent to steal, any copper, brass, bell-metal, utensil, or fixture, being fixed to any dwelling-house, out-house, coach-house, stable, or other building, used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house, or other building, or any iron rails, or fencing set or fixed in any square, court, or other place (such person having no title or claim to title thereto), shall be deemed and construed to be guilty of felony; and the court may order him to be transported for seven years, or kept to hard labour in prison for any time not exceeding three years, nor less than one, subject also to the punishment of public whipping (if the court shall think fit), not exceeding three times: And all persons assisting therein, or who shall buy or receive, &c. knowing, &c. are subject to

the same punishments, although the principal felon or felons has not, or have not, been convicted of stealing the same.

XXX. To explain and amend an act, made in the twenty-ninth year of the reign of his late *Majesty King George the Second*, intituled, An act for more effectually discouraging and preventing the stealing, and the buying and receiving of stolen lead, iron, copper, brass, bell-metal, and solder, and for more effectually bringing the offenders to justice.

By 21 *Geo. 3. ch. 69.* Every person who shall buy or receive any pewter-pot, or other vessel, or any pewter in any form or shape whatever, knowing the same to be stolen, if unlawfully come by; or shall privately, buy or receive any stolen pewter, by suffering any door, window, or shutter, to be left open or unfastened, between sun-setting and sun-rising, for that purpose; or shall buy or receive the same at any time, in any clandestine manner, from any person or persons whatsoever, shall, being thereof convicted by due course of law, although the principal felon or felon has not, or have not, been convicted of stealing the same, be transported for any time not exceeding seven years, or be kept and detained in prison and therein kept to hard labour for any time not exceeding three years, nor less than one year; and within that time (if the court shall think fitting) such offender or offenders shall be once, or oftener, but not more than three times, publicly whipped.

XXXI. For punishing persons wilfully and maliciously destroying any woollen, silk, linen, or cotton goods, or any implements prepared for or used in the manufacture thereof; and for repealing so much of two acts, made in the twelfth year of King *George the First*, and the sixth year of his present *Majesty*, as relates to the punishment of persons destroying any woollen or silk manufactures, or any im-

(*d*) See the indictments against *Principal* and *Aider*. *Cr. Cir. Com.* 7th Edit. 459. Against the *Receiver*. *Ibid.* 460. *Vide Hickman's case* and references, noted in the same book, touching the manner of laying an indictment for stealing lead from a church. *Page 461.*

plements prepared for, or used therein (e).

By 22 Geo. 3. ch. 40. § 1. If any person or persons shall, by day or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any serge or other woollen goods in the loom, or any tools employed in making thereof; or shall wilfully and maliciously cut or destroy any such serges or woollen goods in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any such serges or other woollen goods are hanged in order to dry; or shall wilfully and maliciously break or destroy any tools used in the making any such serges or other woollen goods, not having the consent of the owner so to do; every such offender, being thereof lawfully convicted, shall be guilty of felony, without benefit of clergy.

§ 2. To the same effect as to silk goods, or tools used in the manufacturing thereof.

§ 3. The like as to linen and cotton manufactures, &c.

§ 4. Repeals part of 12 Geo. 1. ch. 34; and,

§ 5. Repeals part of 6 Geo. 3. ch. 28. (f).

XXXII. For the more easy discovery and effectual punishment of buyers and receivers of stolen goods.

By 22 Geo. 3. ch. 58. § 1. Buyers or receivers of stolen goods (except lead, iron, copper, brass, bell-metal, and folder), although the offence of the principal amounts to *petit larceny* (g) only, knowing, &c. may be prosecuted for a misdemeanor, and punished by fine, imprisonment, or whipping, although the principal felon or felons be not before convicted of the said felony, and whether he, she, or they is or are amenable to justice or not. But where the felony actually committed shall amount to *grand larceny*, and the party actually committing thereof shall not be before convicted, such offender or offenders shall be exempted from being punished as accessory or accessories, if such principal felon or felons shall be afterwards convicted.

By § 2. Justices may grant search-warrants and commit, &c.

§ 3. Constables, &c. may apprehend persons suspected, &c.

(e) *Vide* 28 Geo. 3. ch. 55. and 29 Geo. 3. ch. 46. abstracted hereafter, being No. LVIII. and LX.

(f) For an *Indictment on the stat.* in question, viz. 22 Geo. 3. ch. 40. *vide Cr. Cir. Com.* 9th Edit. 692.

(g) At common law there can be no *accessaries* in *petit larceny*. *Vide ante*, p. 616.

* Duties under this act to cease, and new ones granted, by 31 Geo. 3. ch. 25. abstracted post.

† Partly repealed by 36 Geo. 3. ch. 52, abstracted post.

§ 4. Persons offering stolen goods to be pawned or sold may (upon reasonable cause) be taken before a justice, &c.

§ 5. Persons under fifteen years of age, charged with felony, within benefit of clergy, pardoned upon discovering two or more receivers, &c.

§ 6. Not to repeal any former law, &c. nor shall an offender convicted under this act be punished for the same offence by any such former law.

XXXIII. For repealing an act made in the twenty-second year of his present *Majesty*, intituled, *An act for charging a stamp duty upon inland bills of exchange, promissory notes, or other notes payable otherwise than upon demand*; and for granting new stamp duties on bills of exchange, promissory and other notes; and also stamp duties upon receipts*.

By 23 Geo. 3. ch. 49. § 20. If any person shall counterfeit or forge, or procure to be counterfeited or forged any stamp or mark directed or allowed to be used by this act, or shall fraudulently use, &c. with intent, &c. or shall utter, vend, sell, or expose to sale, any vellum, parchment, or paper, liable to the said duties, with any counterfeit mark or impression thereupon, knowing, &c. he shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXXIV. For granting to his *Majesty* several additional and new duties upon stamped vellum, parchment, and paper; and also for repealing certain exemptions from the stamp duties†.

By 23 Geo. 3. ch. 58. § 11. If any person shall counterfeit or forge, or procure to be counterfeited or forged, any seal, stamp, or mark, directed or allowed to be used by this, or any other act, or shall utter, &c. or privately or fraudulently use any seal, &c. he shall, upon conviction,

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suffer death as in cases of felony without benefit of clergy.

&c. he shall be deemed guilty of felony, and transported for seven years.

XXXV. For the more effectual preventing the illegal importation of foreign spirits, and for putting a stop to the private distillation of British-made spirituous liquors, &c.

By 23 Geo. 3. ch. 70, § 9. Persons making frames, moulds, plates, &c. for excise-permits, or paper for that purpose, &c. and their aiders, unless appointed by the commissioners of excise, &c. shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXXVI. To extend the provisions of an act (intituled an act to amend and make more effectual the laws relating to *rogues, vagabonds, and other idle and disorderly persons, and to houses of correction*), to certain cases not therein mentioned.

By 23 Geo. 3. ch. 28. If any person or persons be apprehended having any implement for house-breaking, or any offensive weapon, with a felonious intent, &c. or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or out-housete, or in any inclosed yard or garden, or area belonging to any house, with an intent to steal any goods or chattels; every such person shall be deemed a rogue and vagabond, within the intent and meaning of stat. 17 Geo. 2. ch. 5. (b)

XXXVII. For granting to his Majesty certain additional rates of postage for conveyance of letters and packets, by the post, within the kingdom of Great Britain; and for preventing frauds, &c.

By 24 Geo. 3. Jeff. 2. ch. 37. § 9. If any person shall forge or counterfeit the handwriting of any person whatsoever, in the subscription of any letter or packet to be sent by the post in order to avoid the postage, or the date, &c. or shall send by the post any forged or counterfeited subscription on any letter or packet, knowing,

XXXVIII. For the more effectual prevention of smuggling in this kingdom.

Wide No. LVI. and LXXI. pp.

By 24 Geo. 3. Jeff. 2. ch. 47. § 11. If any person shall maliciously shoot at any ship, vessel, or boat, belonging to his Majesty's navy, or in the service of the customs or excise, within four leagues of the limits of any port, &c. or the coast thereof, &c. or at any officer, &c. when in the execution of their duty, he shall, being thereof fully convicted, be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; and so as to the abettors and abettors therein.

XXXIX. For granting to his Majesty certain duties on licences for vending hats by retail, &c.

By 24 Geo. 3. Jeff. 2. ch. 51. § 15. If any person shall counterfeit, &c. or privately or fraudulently use, &c. any law-stamp, or mark, directed or allowed by this act, he shall be adjudged a felon, and suffer death, without benefit of clergy.

XL. For the transportation of felons and other offenders, &c.

By 24 Geo. 3. Jeff. 2. ch. 56. § 1. His Majesty in council may direct to what part the felons shall be conveyed, &c. By 16 they may be sent to the Rover Thanes, &c. There are many regulations respecting the subject in the statute: and there are also other subsequent statutes, such as 27 Geo. 3. ch. 2. touching the transportation of felons to New South Wales, &c. See also 28 Geo. 3. ch. 24. and 37 Geo. 3. ch. 140.

XLI. To empower the justices of oyer and terminer and gaol-delivery of Newgate for the county of Middlesex, to continue, &c.

By 25 Geo. 3. ch. 18. If a justice of oyer and terminer and gaol-delivery of Newgate for the county of Middlesex shall have been begun, before the *effigia* day of any term, it shall not be discontinued by the sitting of the court of King's Bench, &c.

(b) *Wide 27 Geo. 3. ch. 114.*
• Partly repealed by 36 Geo. 3. ch. 125. abstracted pp.

XLII. For granting to his *Majesty* certain stamp-duties on licences to be taken out by pawn-brokers.

By 25 *Geo. 3. ch. 48.* § 10. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same upon any vellum, &c. or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLIII. For repealing an act made in the twenty-fourth year of the reign of his present Majesty, intituled, *An act for granting to his Majesty certain duties on certificates, issued with respect to the killing of game; and for granting other duties in lieu thereof.*

Vide No. LXIV. pof.

By 25 *Geo. 3. ch. 50.* § 19. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLIV. For granting to his *Majesty* certain duties on licences to be taken out for vending gloves or mittens, by retail.

By 25 *Geo. 3. ch. 55.* § 15. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall utter or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLV. For repealing an act made in the twenty-third year of the reign of his present Majesty, intituled, *An act for granting to his Majesty a stamp duty on licences to be taken out by certain persons uttering or vending medicines, &c. and for granting other duties in lieu thereof.*

By 25 *Geo. 3. ch. 79.* § 17. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same upon any vellum, &c. or shall utter,

or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLVI. For granting to his *Majesty* certain duties on certificates to be taken out by solicitors, attorneys, &c. and other duties with respect to warrants, mandates, and authorities, to be entered or filed of record.

By 25 *Geo. 3. ch. 80.* § 3c. If any person shall counterfeit or forge any seal, stamp, or mark, directed or allowed by this act, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLVII. For granting to his *Majesty* certain duties on stamped vellum, parchment, and paper, within that part of *Great Britain* called *Scotland*, to replace to the revenue the salaries granted to judges there, &c.

By 26 *Geo. 3. ch. 48.* § 9. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble, or cause, &c. the impression of the same upon any vellum, &c. or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLVIII. For granting to his *Majesty* certain stamp duties on perfumery, hair powder, and other articles therein mentioned; and on licences to be taken out by persons uttering or vending the same.

By 26 *Geo. 3. ch. 49.* § 24. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same upon any vellum, &c. or shall utter, or use, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLIX. For better securing the duties on starch, and for preventing frauds on the said duties.

By

By 26 Geo. 3. c. 51. § 14. If any person shall forge or counterfeit any stamp or seal, to resemble any stamp or seal which shall be provided in pursuance of this act, or shall counterfeit or resemble the impression of the same upon the papers containing starch, thereby to defraud, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

L. For regulating houses, and other places, kept for the purpose of slaughtering horses.

By 26 Geo. 3. c. 71. § 8. If any person shall slaughter any horse, mare, or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle, for any other purpose than for butcher's meat; or shall lay any horse, &c. brought dead to such slaughter-house, or other place, without taking out a licence, or without giving notice, &c. or shall slaughter, &c. at any time, other than and except certain hours in this act limited, &c. he shall upon conviction, be adjudged, deemed, and taken to be guilty of *felony*, and shall be punished by fine and imprisonment, and such corporal punishment, by public or private whipping, or shall be transported beyond the seas for any time not exceeding seven years, as the court shall direct.

By § 9. Persons destroying, limeing, or burying hides, &c. shall, upon conviction, be adjudged guilty of a misdemeanour, and punished by fine and imprisonment, and such corporal punishment by public or private whipping, as the court shall direct.

LI. For better securing the duties on paper printed, painted, or stained in Great Britain.

By 26 Geo. 3. c. 78. § 13. If any person shall counterfeit or forge any stamp or seal, to resemble any stamp or seal provided by this act, or shall counterfeit or resemble the impression, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

LII. For the more effectually carrying into execution the laws relating to the duties on stamped vellum, parchment, and paper, &c. [touching general evidence, &c.]

By 26 Geo. 3. c. 82. § 6. Reciting that "great difficulties have frequently arisen upon the trial of divers informations, indictments, and other prosecutions for of-

fences committed against his Majesty's revenue on stamped vellum, parchment, &c. paper, by requiring strict proof of the commissions, deputations, or other authority under which the said commissioners, as the officers, and other persons appointed and employed by them to carry the law into execution, have acted," it is enacted that upon the trial of any information, indictment, or other prosecution, for an offence committed against any act or acts of parliament touching or concerning the said duties, or any of them, whereby any person shall or may be deemed or construed to be guilty of *felony*, it shall be sufficient to prove that such officer, &c. acted under the commissioners, without producing or proving the particular commission, deputation, or other authority by which he was confirmed, appointed, or employed.

LIII. For incorporating certain persons therein named, by the name and stile of the British Society for extending the fisheries, and improving the Sea-coasts of this kingdom; and to enable them to subscribe a joint stock, and therewith to purchase lands, and build thereon, in Scotland, &c.

By 26 Geo. 3. c. 106. § 26. If any person shall forge or counterfeit the seal of the society, or any deed or writing under the common seal, or shall demand any money in pursuance, of any such forged or counterfeited deed or writing, either from the society or any members or servants thereof, knowing, &c. he shall be adjudged guilty of *felony*, and shall be transported in manner as by law directed, for a term not exceeding seven years.

LIV. For repealing the several duties of customs and excise, and granting other duties in lieu thereof, and for applying the said duties, with others, composing the revenue, &c. and for applying certain unclaimed monies, remaining in the Exchequer for the payment of annuities on lives, to the reduction of the national debt.

By 27 Geo. 3. c. 13. § 46. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this, or any former act or acts, relating to the duties under the manage-

Management of the commissioners, &c. or shall counterfeit or resemble the impression of the same; or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy*.

LV. For making allowances to the dealers in *foreign wines*, for the stock of certain *foreign wines* in their possession, at a certain time, upon which the duties on importation have been paid; and for amending several laws relative to the *revenue of excise*.

By 27 Geo. 3. ch. 31. § 13. If any person shall counterfeit or forge any stamp or seal to resemble any stamp or seal which shall be provided or made in pursuance of this act, or shall counterfeit or resemble the impression of the same, upon any printed, stained, painted, or dyed calico, muslin, linen, stuff, fustian, velvet, velveret, dimity, or other figured stuff, with intent, &c. he shall be adjudged guilty of felony, and shall suffer death, without benefit of clergy.

LVI. For making further provisions in regard to such *vessels* as are particularly described in an act made in the twenty-fourth year of the reign of his present Majesty, for the more effectual prevention of smuggling in this kingdom (i), and for extending, &c. &c.

By 27 Geo. 3. ch. 32. § 14. If any person shall forge, &c. any stamp or seal, or the impression, &c. to resemble, &c. those provided by this act, he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

LVII. For taking and swearing *affidavits* to be made use of in the court of session of the county palatine of *Chester*, and for taking of special bail in actions and suits depending in the same court.

* Repealed as to duties on goat and sheep skins, by 31 Geo. 3. ch. 27. Vide No. XCIV. post.

(i) Vide No. XXXVIII. ante; No. LXVII. and LXXI. post.

(k) See an indictment for personating bail on this statute, *viz.* 4 W. & M. ch. 4. Cr. Cir. Com. 7th Edit. 185. It does not take away the benefit of clergy, but that of 21 Jas. 1. ch. 26, in certain cases, does. Vide observations on both these statutes same book, p. 188. Vide also ante, 696.

By 27 Geo. 3. ch. 43. § 4. Any person who shall before any person or persons empowered by this act to take special bail, represent or personate any other person or persons, whereby the person or persons so represented or personated may be liable to the payment of any sum or sums of money for debt or damages, to be recovered in the same suit or action wherein such person or persons is or are represented or personated, as if he, she, or they, had really acknowledged and entered into the same, he shall be adjudged a felon, and shall suffer and incur the same pains, penalties, and forfeitures, as persons convicted of the like offences are liable to by virtue of an act past in the fourth year of the reign of king *William* and queen *Mary*, intituled An act for taking special bail in the country, upon actions and suits depending in the courts of King's Bench, Common Pleas, and Exchequer at Westminster (k).

Vide stat. 34 Geo. 3. ch. 46. § 5, as to personating bail, &c. in the county palatine of *Lancaster*.

LVIII. For the better and more effectual protection of *stocking frames*, and the machines or engines annexed thereto, or used therewith; and for the punishment of persons destroying or injuring of such stocking frames, machines, or engines, and the frame-work knitted pieces, &c.

Vide No. XXXI. ante, and No. LX. post.

By 28 Geo. 3. ch. 55. § 4. If any person shall by day or by night, enter by force into any house, shop, or place, with an intent to cut or destroy any frame-work knitted pieces, stockings, or other articles, &c. or shall wilfully and maliciously cut or destroy any frame-work knitted pieces, &c. or shall wilfully and maliciously break, destroy, or damage any frame, machine, engine, tool, instrument, or utensil, used in and for the working and making of any such frame-work knitted pieces, &c. not having the consent of the owner so to do, &c. he shall be adjudged guilty of felony, and shall be transported to some of his Majesty's dominions beyond the seas, for any space or term of years not exceeding fourteen years nor less than seven years.

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LIX. For raising a certain sum of money, by way of *annuities*, to be attended with the benefit of survivorship, in *clauses*.

By 29 *Geo. 3. ch. 41. § 36.* Persons forging, &c. or altering registers, &c. or perforating the proprietor of any order, &c. or *nomine*, &c. shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.

LX. For preventing the wilfully burning or destroying ships, and the wilfully and maliciously destroying any woollen, silk, linen, or cotton goods, or any implements prepared for or used in the manufacture thereof, in that part of Great Britain called Scotland.

By 29 *Geo. 3. ch. 46.* Any owner, &c. destroying any vessel with intent to defraud underwriters, &c. shall, upon conviction in Scotland, suffer death, as in other cases of capital crimes: so as to persons entering forcibly into any house, &c. with intent to destroy any goods in the loom, &c. or tools, &c. upon conviction in Scotland.

LXI. For granting to his *Majesty* several additional stamp duties on newspapers, advertisements, and on cards and dice.

By 29 *Geo. 3. ch. 50. § 13.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this or any former act of parliament, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. with intent to defraud his *Majesty*, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXII. For granting to his *Majesty* several additional stamp duties on probates of wills, letters of administration, and on receipts for legacies, or for any share of a personal estate divided by force of the statute of distributions*.

By 29 *Geo. 3. ch. 51. § 8.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed or allowed to be used by this or any former act of parliament, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXIII. For giving relief to such persons as have suffered in their rights and properties, during the late unhappy dissensions in America, &c. and also for making compensation to such persons as have suffered in their properties in consequence of the cession of the province of East Florida to the King of Spain.

By 30 *Geo. 3. ch. 34. § 11.* If any person shall forge or counterfeit any order, which shall have been made forth, or renewed, by virtue of this act, before the same shall have been paid off and cancelled, or any indorsement, &c. or tender in payment, &c. with intent to defraud his *Majesty*, or the person to be appointed to pay off the same, or to pay any interest thereupon, he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXIV. For granting to his *Majesty* an additional duty on certificates issued with respect to the killing game (*l*).

By 31 *Geo. 3. ch. 21. § 5.* If any person shall counterfeit, &c. any seal, stamp, or mark, to resemble any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXV. For repealing the duties now charged on bills of exchange, promissory notes, and other notes, drafts, and orders, and on receipts; and for granting other duties in lieu thereof (*m*).

* Repealed as to receipts for legacies, and new duties granted, by 36 *Geo. 3. ch. 5.*
abstracted post.

(*l*) *Vide No. XLIII. ante.* (*m*) *Vide No. LXXVII. and No. XC. pag.*

By 31 Geo. 3. ch. 25. § 29. If any person shall counterfeit, &c. any stamp or mark, directed by this act, or resemble the impression of the same, or shall utter, or use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXVI. To render persons convicted of petty larceny competent witnesses.

By 31 Geo. 3. ch. 35. Reciting that Whereas persons convicted of *grand larceny* are by their punishment *referred to their credit as witnesses*, but persons convicted of *petty larceny* are rendered and remain wholly incompetent to be examined as *witnesses*, it is enacted, that from and after the twenty-fourth day of *June*, one thousand seven hundred and ninety-one no person shall be an incompetent witness by reason of a *conviction for petty larceny*.

LXVII. For explaining and amending an act, passed in the thirty-first year of the reign of his late Majesty King George the Second, intituled *An act for the encouragement of seamen employed in the Royal Navy*, &c. and for further extending the benefits thereof to petty officers and seamen, non-commissioned officers of marines, and marines, serving, or who may have served, on board any of his Majesty's ships.

Vide No. LXXIV. post.

By 32 Geo. 3. ch. 33. § 23. If any person shall falsely make, forge, or counterfeit, &c. or utter, &c. any ticket for the wages or pay due to any petty officer or seaman, non-commissioned officer of marines, or marine, for his services on board any ship or vessel of his Majesty, or any duplicate thereof, &c. with intention to receive any wages, &c. shall suffer death as a felon, without benefit of clergy.

LXVIII. For explaining and amending an act passed in the twenty-sixth year of the reign of his present Majesty, intituled *An act for the further preventing frauds and abuses attending the payment of wages, prize-money, &c.* and for further extending

the benefits thereof to petty-officers, &c.

Vide No. LXXIV. post.

By 32 Geo. 3. ch. 34. § 29. If any person shall falsely make, forge, or counterfeit, &c. or utter, &c. any petition for a certificate to enable any person or persons, to obtain letters of administration to any petty officer, &c. or shall falsely make, forge, or counterfeit, &c. or utter, &c. any certificate for enabling him to obtain probate or letters of administration, with the will annexed, &c. he shall suffer death as a felon, without benefit of clergy.

LXIX. For enabling his Majesty to direct the issue of exchequer bills, to a limited amount, for the purposes and in the manner therein mentioned.

By 33 Geo. 3. ch. 29. § 48. If any person shall forge, &c. any certificate or certificates of the commissioners by this act appointed, or any receipt to be given by the cashier or cashiers of the bank of England, in pursuance of this act; or shall wilfully deliver to the auditor of the receipt of his Majesty's exchequer for the time being, &c. or shall utter, &c. with intent to defraud his Majesty, or any body or bodies politic or corporate, or any person whomsoever, he shall suffer death as in cases of felony without benefit of clergy.

LXXX. For the better preventing forgeries and frauds in the transfers of the several funds transferable at the bank of England.

By 33 Geo. 3. ch. 30. § 1, 2, 3. Persons making, or assisting in making, transfers of stock in any other names than the owners; or forging or assisting in forging transfers, &c. or making, or assisting in making, false entries in the books of the bank, &c. shall be deemed guilty of felony, and shall suffer death without benefit of clergy.

And by § 4. If any clerk, &c. employed or entrusted by the governor and company, shall knowingly or willingly make out or deliver, &c. any *dividend warrant* for a greater or less amount than the person or persons, on whose behalf, or pretended behalf, such *dividend warrants* shall be made out, is or are entitled to, with intent, &c. he shall, upon conviction, be transported for seven years.

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LXXI. For better preventing offences in obstructing, destroying, or damaging ships or other vessels, and in obstructing seamen, keel-men, casters, and ship-carpenters, from pursuing their lawful occupations (*n*).

By 33 Geo. 3. cb. 67. § 5. If any seaman, keel-man, cafer, ship-carpenter, or other person, shall wilfully and maliciously burn or set fire to any ship, keel, or other vessel, he shall suffer death as in cases of felony, without benefit of clergy. By § 4. seamen, keel-men, &c. wilfully and maliciously destroying or damaging any ship, keel, or other vessel (otherwise than by fire), shall be adjudged guilty of felony, and shall be transported for any time not exceeding fourteen years, nor less than seven years. And by § 8. it is provided, that no person or persons shall be prosecuted by virtue of this act, for any of the offences aforesaid, unless such prosecution be commenced twelve calendar months after the offence committed.

LXXII. For granting to his *Majesty* certain stamp duties on indentures of clerkships to solicitors and attorneys in any of the courts in *England* therein mentioned.

By 34 Geo. 3. cb. 14. § 14. If any person shall counterfeit, &c. any seal, stamp, or mark, to resemble any seal, stamp, or mark directed by this act, or shall utter, vend, or sell any vellum, parchment, or paper liable to such stamp duty, with such counterfeit stamp or mark thereupon, knowing, &c. he shall suffer death, as in cases of felony, without benefit of clergy.

LXXIII. For taking of special bail in actions and suits depending in court of *common-pleas*, of the county palatine of *Lancaster*.

By 34 Geo. 3. cb. 46. § 5. Persons taking bail, &c. is made felony, upon the same principle as that for the county palatine of *Chester*, abstracter aste, No. LVI.

LXXIV. To enable petty officers in the navy, seamen, non-com-

missioned officers of marine, and mariners, serving in his *Majesty's* navy, to allot part of their pay for the maintenance of their wives and families (*s*).

By 35 Geo. 3. cb. 28. § 30. If any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, or willingly act, &c. any declaration or order for payment, or any certificate or receipt therein before described, or mentioned; or shall utter, &c. he shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

LXXV. For granting to his *Majesty* several additional duties on stamped vellum, parchment, and paper; and for repealing a certain exception as far as relates to bonds given as security for the payment of one hundred pounds or under, contained in an act of the twenty-third year of his present *Majesty's* reign.

By 35 Geo. 3. cb. 30. § 4. If any person shall counterfeit, &c. any stamp to resemble any stamp directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXXVI. For granting to his *Majesty* a duty on certificates issued for using hair-powder.

By 35 Geo. 3. cb. 49. § 31. If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used by this act; or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXXVII. For granting to his *Majesty* certain additional duties on receipts.

By 35 Geo. 3. cb. 55. § 17. If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used, or provided, made, or used in pursuance of

(n) *Vide* No. XXXVIII. LVI. and LX. *ante*.

(s) *Vide* No. LXVII. and LXVIII. *ante*.

31 Geo. 3. ch. 25. (p) or this act, or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, expose to sale, or use, &c. he shall be adjudged a felon, and suffer death as in cases of felony without benefit of clergy.

LXXVIII. For granting to his Majesty certain stamp duties on sea insurances.

By 35 Geo. 3. ch. 63. § 23. If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used, in pursuance of this act, or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, expose to sale, or use, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXXIX. For making part of certain principal sums or stock and annuities raised or created, or to be raised or created by the parliament of the kingdom of Ireland, on loans for the use of the government of that kingdom, transferable, and the dividends on such stock and annuities payable at the *Bank of England*, &c. (q).

By 35 Geo. 3. ch. 66. § 3, 4, 5, 6, 7, 8, 9. Persons forging, altering, or uttering, &c. receipts or debentures, &c. or forging letters of attorney or other authority or instrument to transfer, assign, sell, or convey any stock, &c. or personating proprietors; or forging dividend warrants, &c. or (being officers of the bank) embezzling notes, &c. or making transfers in the names of any other person or persons, than the proprietor or proprietors, &c. or forging transfers, &c. or making false entries in the books of the *Bank of England*, with intent to defraud the governor and company of the *Bank of England*, or any other body politic or corporate, or any person or persons whatsoever, shall be deemed guilty of felony, and shall suffer death, without benefit of clergy.

By § 10. Clerks, &c. of the Bank making out false dividend warrants, to be transported for seven years.

LXXX. For rendering more effectual an act, passed in the first year of the reigu of King James

(p) Vide No. LXV. ante.

(r) Vide No. LXVII. LXVIII. and LXXIV. ante.

the First, intituled, *An act to restrain all persons from marriage until their former wives and former husbands be dead.*

By 35 Geo. 3. ch. 67. § 1. Persons convicted in England of bigamy are subject to the penalties, pains, and punishments as, by the laws now in force, persons are subject and liable to, who are convicted of grand or petit larceny: and by § 2. if they shall be at large within Great Britain, without some lawful cause, before the expiration of the term for which they shall be ordered to be transported, they shall be guilty of felony, and shall suffer death, without benefit of clergy.

By § 3. If found at large in Great Britain, after order of transportation, they may be tried either in the county where they had been convicted, or in that in which they are apprehended and taken.

LXXXI. For establishing a more easy and expeditious method for the punctual and frequent payment of the wages and pay of certain officers belonging to His Majesty's navy. (r)

By 35 Geo. 3. ch. 94. § 34. If any person shall falsely make, forge, &c. or willingly act and assist, &c. or shall utter and publish as true, knowing, &c. any false, forged, or counterfeited order, bill, extract, or certificate, &c. for the purpose of defrauding the public, or any commissioned officer, &c. he shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

LXXXII. To prohibit, for a limited time, the making of starch, hair-powder, and blue, from wheat, and other articles of food; and for lowering the duties on the importation of starch, and of other articles made thereof.

By 36 Geo. 3. ch. 6. § 13. If any person shall forge, &c. any stamp or seal, to resemble, &c. or counterfeit the impression, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

(q) Vide No. LXXXVII. post.

LXXXIII. For the safety and preservation of his *Majesty's* person and government against treasonable and seditious practices and attempts.

By 36 Geo. 3. c. 7. § 1. Persons who shall compass, devise, &c. the death, restraint, &c. of his *Majesty* or his heirs, or to depose them, or to levy war, or to compel a change of measures, &c. to be deemed *traitors*, and shall suffer pains of death, and also lose and forfeit as in cases of *high treason*. By § 2. Persons in *England* who shall by writing, &c. incite or stir up the people to hatred or contempt of his *Majesty*, or the government, &c. shall be guilty of *high misdemeanors*; and for a second offence may be punished ~~with~~ in the cases of *high misdemeanors*, or banished or transported for seven years. And by § 3. Persons banished or transported found at large within *Great Britain*, without some lawful cause, before the expiration of the term for which, &c. shall suffer death, as in cases of *felony*, without benefit of clergy: And such persons may be tried in any county, &c. either where apprehended and taken, or from whence they were ordered to be banished or transported; and a certificate of the conviction shall be sufficient proof, &c.

LXXXIV. For the more effectually preventing seditious meetings and assemblies.

By 36 Geo. 3. c. 8. § 4. If any persons, exceeding the number of fifty, being assembled contrary to the provisions herein contained, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, &c. where such assembly shall be, by proclamation to be made in the king's name, in the form in this act directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve, or more, notwithstanding such proclamation made, remain or continue together by the space of one hour after such command or request made by proclamation, &c. they shall be adjudged felons, and shall suffer death, as in case of *felony* without benefit of clergy.

LXXXV. For repealing certain duties on legacies and shares of personal estates, and for grant-

ing other duties thereon, in certain cases.

By 36 Geo. 3. c. 52. § 40. If any person shall counterfeit or forge, &c. any stamp directed or allowed to be used or provided in pursuance of this act; or shall counterfeit or resemble the impression of the same, &c. or shall utter, vend, sell, expose to sale, or use, &c. he shall be adjudged a felon, and shall suffer death as a case of *felony*, without benefit of clergy.

LXXXVI. For the better collection of the duty on hats.

[This act. repeals part of 24 Geo. 3. c. 5. 2. c. 51, abrogated ante, p. 732.]

By 36 Geo. 3. c. 125. § 19. If any person shall counterfeit or forge, &c. any stamp or mark directed to be allowed or used, or provided, made, or used, in pursuance of this act, or shall counterfeit or resemble the impression of the same: or shall utter, vend, sell, or expose to sale, &c. any piece of silk, linen, &c. with such counterfeit mark or stamp thereon, knowing, &c. or shall privately or fraudulently use any stamp, &c. he shall be adjudged a felon, and shall suffer death as in case of *felony*, without benefit of clergy.

LXXXVII. For making certain annuities, created by the parliament of the kingdom of *England*, transferable, and the dividends thereon payable, at the *Bank of England*; and for the better security of the proprietors of such annuities, and of the governor and company of the *Bank of England*. (s)

By 37 Geo. 3. c. 46. § 3, 4, 5, 6, 7, 8, 9. Persons forging, altering, &c. receipts or debentures; or forging letters of attorney, &c. or persuading proprietors; or forging or uttering forged dividend warrants, &c. or officers of the bank embezzling notes, &c. or making transfers in other than proprietors names, &c. or forging or uttering forged transfers, &c. or making false entries in the books of the *Bank of England*, &c. with intent to defraud the governor and company of the said bank, or any other body politic or corporate, or any person or persons whatsoever, shall be deemed guilty of *felony*, and shall suffer death, without benefit of clergy. By § 10. Officers of the bank making out false dividend warrants, to be transported for ~~five~~ years.

(s) *Vide* No. LXXIX. ante.

LXXXVIII. Act

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LXXXVIII. For the better prevention and punishment of attempts to seduce persons serving in his *Majesty's forces*, by *sea* or *land*, from their duty and allegiance to his *Majesty*, or to incite them to mutiny or disobedience.

Vide No. XCIV. post.

By 37 *Geo. 3. c. 70.* § 1. Any person attempting to seduce any sailor or soldier from his duty, or inciting him to mutiny, &c. to be adjudged guilty of felony, and to suffer death as in cases of felony, without benefit of clergy. By § 4. To continue and be in force until the expiration of one month after the commencement of the then next session of parliament. Continued for a limited time by 38 *Geo. 3. c. 6.* And further continued by 39 *Geo. 3. c. 4.* till six weeks after the commencement of the then next session.

LXXXIX. For more effectually restraining intercourse with the crews of certain of his *Majesty's ships* now in a state of *mutiny*, and *rebellion*, and for the more effectual suppression of such mutiny and rebellion.

Vide No. XCIV. post.

By 37 *Geo. 3. c. 71.* § 3. Persons communicating with the crew or assisting them shall, on conviction thereof, be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy: And by § 4. All persons voluntarily remaining on board after knowledge of the declaration therein mentioned, shall be adjudged guilty of piracy and felony, and shall suffer such pains of death and loss of lands, goods, and chattels, as any pirates or felons by virtue of an act, made in the eleventh year (⁽¹⁾) of King William the Third, intituled, *An act for the more effectual suppression of piracy*, or any other act, ought to suffer. By § 9. To be in force until the expiration of one month after the commencement of the then next session of parliament.

(1) So in the *purview of Stat.* 37 *Geo. 3. c. 71*; but mentioned 13 & 14 *W. 3. c. 7.* in the margin, which is right, as appears by 4 *Blac. Com.* 72, and the several statute books of *Hawkins*, *Ruffhead*, and *Roxburghe*. If a statute be recited as of the fourth year of the reign, &c. and it appears to have been made in the fourth and fifth years, &c. the variance is fatal. *Ross v. Green*, *Comp.* 474. *Vide also Rex v. Treloarney*, 1 *T. R.* 222, and *Watson v. Shaw and others*, 2 *T. R.* 654.

(a) *Promissory Notes* are parcels of these matters. *Vide No. LXV, & LXXVII, ante*, and also No. C VI, *post*.

XC. For granting to his *Majesty* certain stamp-duties on the several matters (^(a)) therein mentioned, and for better securing the duties on certificates to be taken out by solicitors, attorneys, and others, practising in certain courts of justice in *Great Britain*.

By 37 *Geo. 3. c. 90.* § 5. If any person shall counterfeit, &c. any stamp directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same, with intent, &c. or shall utter, vend, or sell, any vellum, &c. with such counterfeit stamp or mark thereupon, knowing the same to be counterfeit, or shall privately or fraudulently use any stamp directed or allowed to be used by this act, with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XCI. For granting to his *Majesty* an additional stamp duty on *deeds*.

By 37 *Geo. 3. c. 111.* § 5. If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same, with intent, &c. or shall utter, vend, or sell, any vellum, parchment, or paper, with such counterfeit mark or stamp thereupon, knowing, &c. or shall fraudulently use any stamp or mark directed or allowed to be used by this act, with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XCII. For the better preventing the forging or counterfeiting the names of *witnesses* to letters of attorney, or other authorities or instruments, for the transfer of *stocks* or *funds* which now are, or by any act, or acts of parliament shall hereafter be made transferable at the *Bank of England*.

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Land, or for the transfer of any part of the capital stock of the governor and company of the *Bank of England* called *bank stock*; or any part of the stocks or funds under the management of the *South Sea Company*, or *East India Company*; or for the receipt of dividends, &c.

By 37 Geo. 3. ch. 122. § 1. If any person shall falsely make, forge, &c. the name or names, hand-writing, or hand-writings, of any witness or witnesses attesting the execution of any letter of attorney, or other authority, or instrument, to transfer, &c. or shall utter, or publish, as true, any such letter of attorney, or other authority, or instrument, &c. knowing such name or hand-writing to be false, forged, or counterfeited, he shall be adjudged guilty of felony, and shall be transported for seven years, or shall be adjudged to suffer such lesser punishment as the court, before whom such offender shall be tried, shall think fit to award.

XCIII. To prevent the counterfeiting any copper-coin in this realm made, or to be made, current by proclamation, or any foreign gold or silver coin; and to prevent the bringing into this realm, or uttering, any counterfeit foreign gold or silver coin.

By 37 Geo. 3. ch. 126. § 4. If any person shall utter or tender in payment, or give in exchange, or pay or put off any such false or counterfeit coin as aforesaid, resembling or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, he shall suffer six months imprisonment, and find sureties for his good behaviour for six months more; and if he shall be convicted a second time for the like offence, he shall suffer two years imprisonment, and find sureties for his good behaviour for two years more: And if he shall afterwards offend a third time, in like manner, he shall be adjudged to be guilty of felony, without benefit of clergy.

(w) No repeal by the latter stat. of the felony mentioned in the above act of 38 Geo. 3. ch. 16. § 95.

(w) Amended, and further powers given by stat. 38 Geo. 3. ch. 77. vide 33 Geo. 3. ch. 4.

XCIV. To enable his *Majesty* more easily and effectually to grant conditional pardons to persons under sentence by naval courts martial, and to regulate imprisonment under such sentences.

Vide No. LXXXVIII. and LXXXIX. *ante*, and also No. CII. *post*.

By 37 Geo. 3. ch. 140. § 1. If his *Majesty* shall extend his mercy to persons liable to death by the sentence of a naval court martial, a justice of the king's bench, or common pleas, or a baron of the exchequer, may, on notification from the secretary of state, allow the benefit of a conditional pardon as if it had passed under the great seal, and shall make orders accordingly: And by § 6. The laws touching the escape of felons under sentence of death shall apply to offenders under like sentence by a naval court, and to all persons aiding, abetting, or assisting in any such escape, if the offender shall have been allowed the benefit of a conditional pardon.

XCV. For granting to his *Majesty* an aid and contribution for the prosecution of the war.

By 38 Geo. 3. ch. 16. § 95. Persons forging or altering certificates, receipts, or duplicates, &c. or knowingly uttering or publishing them as true, with intent, &c. shall be adjudged guilty of felony, and shall suffer death, without benefit of clergy. By § 107, it is provided, that the present act may be altered, varied, or repealed by any act or acts to be made in this session of parliament. *Vide* income act, vide 39 Geo. 3. ch. 13. which, by § 1, repeals the above stat. in part; but § 36, extends the power of it in other respects, &c. (w)

XCVI. To continue until the first day of August, one thousand eight hundred, and until the end of the then next session of parliament, and amend an act made in the thirty-third year of the reign of his present *Majesty*, intituled, *An act for establishing regulations respecting aliens arriving in this kingdom, or resident therein, in certain cases.* (w)

By 38 Geo. 3. c. 50. § 24. In case any person ordered or adjudged to be transported in pursuance of this act, shall be found at large within this realm, after sentence of transportation pronounced, he or she shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy.

XCVII. For granting to his Majesty a duty on certificates issued with respect to armorial-bearings or ensigns.

By 38 Geo. 3. c. 53, § 18. If any person shall counterfeit, &c. any stamp or mark directed or allowed to be used or provided, in pursuance of this act; or shall counterfeit or resemble the impression of the same, upon any vellum, parchment, or paper, with intention to defraud, &c. or shall utter, vend, sell, or expose to sale, any vellum, parchment, or paper, liable to the said duty, with such counterfeit mark or impression thereupon, knowing, &c. or shall privately or fraudulently use any stamp directed or allowed to be used by this act, with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XCVIII. To amend several laws of excise relating to coacl-makers, auctioneers, beer and cyder exported, certificates and debentures, stamps on hides and skins, drawbacks on wines and sweets, and ale and beer licences.

By 38 Geo. 3. c. 64. § 9. If any person shall, with intent to defraud his Majesty, counterfeit or forge, &c. any debenture in any case in which a debenture is by any act or acts of parliament relating to the duties of excise required or directed to be given or granted, or shall knowingly or willingly utter, publish, or make use of any such counterfeited or forged debenture, he shall be adjudged guilty of felony, and shall suffer death as a felon, and have execution awarded against him, as persons attainted of felony, without benefit of clergy.

By § 10. The pains of death imposed by the 9 Ann. c. 18. 10 Ann. c. 26. and 5 Geo. 1. c. 2. relating to duties on bides

and Miss, &c. declared to be in force against persons who counterfeit stamps provided by those three statutes, or in pursuance of the acts of 28 Geo. 3. c. 37. and 1 Geo. 3. c. 27. (x)

XCIX. For making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of money now charged in Great Britain as a land-tax for one year, from the twenty-fifth day of March one thousand seven hundred and ninety-eight. (y)

By 38 Geo. 3. c. 60. § 118. If any person shall forge, counterfeit, or alter, &c. any contract or contracts for the sale of any land-tax, or any assignment or assignments of such contract or contracts, or of any portion of land-tax therein comprised, or any certificate or certificates of the commissioners of land-tax or of supply, or any chief magistrate authorised by this act to make out the same, or of the surveyor-general of the land revenue of the crown, or of the duchy of Cornwall, or any certificate or receipt of the cashier or cashiers of the governor and company of the bank of England, or any certificate, &c. directed by this act to be made out by the proper officer to the commissioners for the affairs of taxes, &c. or shall wilfully deliver, &c. or utter, &c. he shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.

C. More effectually to prevent, during the war, persons, being his Majesty's subjects, for voluntarily repairing to or remaining in France, or any country or place united to France, or occupied by the armies of France; and to prevent correspondence with such persons and with his Majesty's enemies.

By 38 Geo. 3. c. 79. § 1. If any subject of his Majesty shall, during the war, go, or embark to go to France or any place united thereto, or occupied by its armies, he shall be adjudged guilty of felony, and

(x) Vide No. LIV. ante.

(y) Certain duties to which this act relates, to be levied within one year from March 25, 1799, &c. by 39 Geo. 3. c. 3. See further on this subject of taxation, 39 Geo. 3. c. 6; c. 8; c. 40; c. 43; and c. 108.

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shall suffer death as in cases of felony, without benefit of clergy. By § 4. If any subject shall correspond with any such other subject of his *Majesty*, so going to, and remaining in *France*, he shall be deemed guilty of felony, and shall suffer death without benefit, &c. By § 5. If any subject of his *Majesty* shall, during the war, correspond with the persons exercising the powers of government in *France*, &c. or with any of their agents, knowing such agent or agents to be employed, &c. he shall be adjudged guilty of felony, and shall suffer death, without benefit, &c. By § 8. In case any person ordered or adjudged to be transported under this act, shall be found at large within this realm, after sentence of transportation pronounced, and before the time shall be expired for which such person was sentenced to be transported, he shall be deemed guilty of felony, and shall suffer death, without benefit, &c. By § 2. If any subject of his *Majesty* shall, during the war, knowingly, and wilfully hire, let, engage, &c. or be concerned in the hirings, &c. any vessel, with intent that any of his *Majesty's* subjects should embark therein with intent to go to *France*, &c. he shall be transported for any time not exceeding seven years, to such place as his *Majesty* in council shall direct.

C I. To repeal the duties imposed by an act, made in the last session of parliament, for granting an aid and contribution for the prosecution of the war; and to make more effectual provision for the like purpose, by granting certain duties upon income, in lieu of the said duties.

Vide 39 *Geo. 3.* c. 22; cb. 72.

By 39 *Geo. 3.* cb. 18. § 32. If any person shall give false evidence on oath or affirmation, or in any affidavit or deposition, &c. before the commissioners in the said act mentioned, he shall, upon conviction, be subject and liable to such pains and penalties, as by any law now in being, persons convicted of wilful and corrupt perjury are subject and liable to (y).

(y) By 2 *Geo. 2.* cb. 25. § 2. Persons guilty of wilful and corrupt perjury, or fabrication of perjury, may be imprisoned or transported for seven years; and if they escape, break prison, or return, &c. shall suffer death as felons, without benefit of clergy. Made perpetual by 9 *Geo. 2.* ch. 18.

(z) The stat. of 28 *H. 8.* does not extend to offences committed in ports or towns within the body of a county. 3 *Bac. Abr.* 4th edit. 822.

C II. For remedying certain defects in the law respecting offences committed upon the high seas.

Vide No. XCIV. ante.

By 39 *Geo. 3.* cb. 37. § 1. All offences whatever committed on the high seas, shall be liable to the same punishments as if committed on shore, and shall be enquired of, heard, tried, determined, and adjudged, in the same manner as treasons, felonies, murders and confederacies, are directed to be, by stat. 28 *H. 8.* cb. 15. And by § 1. Persons tried for murder or manslaughter, and found guilty of manslaughter only, shall be entitled to the benefit of clergy, and be subject to the same punishment as if committed on land (z).

C III. For making perpetual so much of an act made in the nineteenth year of the reign of his *Majesty* as relates to the punishment of burning in the hand of certain persons convicted of felony, within the benefit of clergy.

By 39 *Geo. 3.* cb. 46. So much of the stat. of 19 *Geo. 3.* cb. 74. as relates to the punishment of burning offenders convicted of felony, within the benefit of clergy, in the hand, is made perpetual.

Vide No. XXVI. ante, and 39 *Geo. 3.* cb. 46, which perpetuates so much of the said stat. of 19 *Geo. 3.* cb. 74, as relates to the lodgings of Judges at county alices. *Vide* also 39 *Geo. 3.* cb. 51 and 52, which continue (until 25th March, 1801) such parts of said stat. 19 *Geo. 3.* cb. 74, &c. as relate to the confinement of felons in temporary places, &c. or penitentiary houses, &c.

C IV. For the more effectual suppression of societies established for seditious and treasonable purposes; and for better preventing treasonable and seditious practices.

Vide No. LXXXVIII. and LXXXIX. ante.

By

By 39 Geo. 3. ch. 79. § 8. Persons convicted, upon *Indictment*, of the offences and practices mentioned in this act, shall and may be transported for the term of *seven* years, in the manner provided by law for transportation of offenders, or imprisoned for any time not exceeding *two years*, as the court shall think fit; and every such offender, who shall be ordered to be transported, shall be subject and liable to all laws (a) concerning offenders ordered to be transported.

CV. To protect masters against embezzlements by their clerks or servants.

By 39 Geo. 3. ch. 85. If any servant or clerk shall, by virtue of his employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on the account of his master or employer, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, he shall be deemed to have feloniously stolen the same from his master or employer, for whose use, or in whose name, or on whose account the same was or were delivered to, or taken into the possession of such servant, or clerk, &c. and every such offender, his adviser, procurer, aider, or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported for any term not exceeding *fourteen* years, in the discretion of the court before whom such offender shall be convicted or adjudged.

CVI. For granting to his Majesty certain stamp duties on bills of exchange and promissory notes for small sums of money.

By 39 Geo. 3. ch. 107. § 25. If any person shall counterfeit or forge any stamp or mark, directed or allowed to be used by this act, with intent, &c. or shall fraudulently use any such stamp or mark, with intent, &c. or shall utter, vend, sell, or expose to sale, any vellum, &c. with any such counterfeit stamp or mark thereupon,

knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

CVII. For rendering more commodious, and for better regulating, the port of London.

By 39 Geo. 3. ch. 69. (b) § 104. If any person shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in any canal, dock, basin, cut, or other works to be made by virtue of this act, he shall be adjudged guilty of felony, without benefit of clergy. And persons otherwise wilfully damaging the works, or vessels, &c. shall suffer punishment by fine, imprisonment, or transportation, at the discretion of the judge, &c. before whom such offender shall be tried and convicted.

CVIII. For enabling his Majesty to incorporate by charter a company to be called The Globe Insurance Company, for insurance on lives, and against loss or damage by fire, and for other purposes therein mentioned.

By 39 Geo. 3. ch. 83. (c) § 22. If any person shall forge or counterfeit the common seal of the said corporation to be created and established pursuant to this act, or shall forge, counterfeit, or alter, any policy, deed, bill, bond, or obligation under the common seal of the said corporation, or shall offer to dispose of, or pay away the same, knowing the same to be such; or shall demand the money therein contained, or pretended to be due thereon, of or from the said corporation, or any of the officers thereof, knowing, &c. with intent to defraud the said corporation, or any person or persons whomsoever, he shall be deemed guilty of felony, and suffer as in cases of felony, without benefit of clergy. By § 23. To be deemed, adjudged, and taken to be a public act.

The Charter mentioned in this act is not yet complete, it being under the consideration of the privy council upon the attorney-general's report.

(a) *Vide note under No. CI. ante:*

(b) In order to facilitate the labour of others, it has been judged necessary to observe here, that there are two of these numbers in the *Statute books*, and that this act will be found under a new head, intituled, "PUBLIC LOCAL AND PERSONAL ACTS," in p. 228, vol. 14. of *Runnington's* edition of the *Statutes*, and vol. 18. of *Ruffhead's*, so as to the next ch. which begins in those books, p. 261.

(c) *Vide note (b) supra.*

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